THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

REFERENCE ONLY

Mx North
Gallery.

UNIVERSITY OF LONDON
LIBRARY

1954

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING

CHANCERY DIVISION

AND CASES IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL

Editor - - -	R. P. COLINVAUX,	Barristers-at-Law
Assistant Editor -	CHARLES CLAYTON,	

Reporters:

Court of Appeal - - -	B. A. BICKNELL, E. DANGERFIELD,	*Barristers-at-Law*
Chancery Division - - -	J. L. DENISON, K. R. A. HART, F. R. DYMOND, I. G. R. MOSES,	*Barristers-at-Law*

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 3 STONE BUILDINGS,
LINCOLN'S INN, LONDON, W.C.2,
AND
Printed by THE EASTERN PRESS, LTD., LONDON AND READING

THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES

MEMBERS OF THE COUNCIL

Chairman—The Hon. Mr. Justice McNAIR
Vice-Chairman—Sir LESLIE FARRER, K.C.V.O.

EX-OFFICIO MEMBERS

The Rt. Hon. Sir REGINALD MANNINGHAM-BULLER, Q.C., M.P.	ATTORNEY-GENERAL
Sir HARRY HYLTON-FOSTER, Q.C., M.P.	SOLICITOR-GENERAL
FREDERIC H. JESSOP, Esq.	President of the Law Society

ELECTED MEMBERS

The Rt. Hon. Lord Justice JENKINS J. H. STAMP, Esq.	Lincoln's Inn
J. V. NESBITT, Esq. R. E. BURRELL, Esq., Q.C.	Inner Temple
W. LATEY, Esq., M.B.E., Q.C. MONTAGUE L. BERRYMAN, Esq., Q.C.	Middle Temple
The Hon. Mr. Justice McNAIR S. E. POCOCK, Esq., O.B.E. *A. G. P. JOHNSON, Esq.	Gray's Inn
H. EDMUND DAVIES, Esq., Q.C. R. E. MEGARRY, Esq.	Appointed on the nomination of the General Council of the Bar
Sir LESLIE FARRER, K.C.V.O. (Firm: Messrs. Farrer & Co.) KENNETH D. COLE, Esq. (Firm: Messrs. Linklaters & Paines)	The Law Society

* Co-opted Member.

Secretary—F. G. HUDSON, Esq.
Assistant Secretary—F. E. SMITH, Esq.
3 Stone Buildings, Lincoln's Inn, W.C.2

JUDGES

OF

THE COURT OF APPEAL

1954

Lord Simonds, Lord Chancellor

Lord Kilmuir, Lord Chancellor

Lord Goddard, Lord Chief Justice of England

Sir Francis Raymond Evershed, Master of the Rolls

Lord Merriman	President of the Probate, Divorce and Admiralty Division
Sir Donald Bradley Somervell	Lords Justices
Sir John Edward Singleton	
Sir Alfred Thompson Denning	
Sir David Llewellyn Jenkins	
Sir William Norman Birkett	
Sir Francis Lord Charlton Hodson	
Sir John William Morris	
Sir Charles Robert Ritchie Romer	
Sir Hubert Lister Parker	

JUDGES

OF

THE CHANCERY DIVISION

1954

Sir Harry Bevir Vaisey
Sir Ronald Francis Roxburgh
Sir Henry Wynn-Parry
Sir Charles Eustace Harman
Sir Harold Otto Danckwerts
Sir George Harold Lloyd-Jacob
Sir Gerald Ritchie Upjohn

Attorneys-General

Sir Lionel Frederick Heald

Sir Reginald Edward Manningham-Buller

Solicitors-General

Sir Reginald Edward Manningham-Buller

Sir Harry Braustyn Hylton-Foster

BIBL. LONDIN. UNIV.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1954, will be as follows:—

In the First Series,
[1954] Ch. [1954] P.

In the Second Series,
[1954] 1 Q.B. [1954] 2 Q.B.

In the Third Series,
[1954] A.C.

TABLE OF CASES REPORTED
IN THIS VOLUME

A PAGE

Adlard, *In re*. Taylor *v.* Adlard - - - - 29
Allan, *In re*. Allan *v.* Midland Bank Executor and Trustee Co. Ld. - - 295
Allen, decd., *In re*. Faith *v.* Allen (No. 2) - - - 259
Ash, Public Trustee *v.* *In re* Greaves - - - - 434
Azoff-Don Commercial Bank, *In re* - - - - 315

B

Barclays Bank Ld. *v.* Bird - 274
Barclays Bank Ld. *v.* Staughton. *In re* Spensley's Will Trusts - - 233
Bird, Barclays Bank Ld. *v.* 274
Blizzard *v.* Lockhart. *In re* Wright - - - - 347
Bonsor *v.* Musicians' Union 479
Brougham and Vaux (Lord), *In re* - - - - - 24
Brown, decd., *In re*. District Bank Ld. *v.* Brown - 39

C

Camille and Henry Dreyfus Foundation Inc. *v.* Inland Revenue Commissioners - 672
Campbell Coverings Ld. (No. 2), *In re* - - - - 225
Church of England Building Society *v.* Piskor - - 553
Churston Settled Estates, *In re* - - - - - 334

D PAGE

Dankbars, *In re* - - - 98
Dargie, decd., *In re*. Miller *v.* Thornton-Jones - - 16
Dark, decd., *In re*. Glover *v.* Dark - - - - 291
Dean *v.* Prince - - - 409
Delhi Electric Supply and Traction Co. Ld., *In re* - 131
District Bank *v.* Brown. *In re* Brown - - - - 39
Dorset County Council, Wallbridge *v.* - - - - 659
Dudley, Earl of, Woodward *v.* 283

E

Earl of Dudley, Woodward *v.* 283

F

Faith *v.* Allen. *In re* Allen, decd. (No. 2) - - - 259
Family Welfare Association Trustees Ld., Westminster Bank Ld. *v.* *In re* Koettgen's Will Trusts - - 252

G

Gaddum *v.* Inland Revenue Commissioners. *In re* Joynson's Will Trusts - 567
Gilpin, *In re*. Hutchinson *v.* Gilpin - - - - 1
Glover *v.* Dark. *In re* Dark, decd. - - - - 291

PAGE

Grace *v.* Lucas. *In re* Wilson, decd. - - - - 733
Greaves, *In re.* Public Trustee *v.* Ash - - - 434

H

Hatton *v.* Jones. *In re* Mitchell, decd. - - - 525
Heasman *v.* Jordan - - 744
House Property and Investment Co. Ld., *In re* - - 576
Hutchinson *v.* Gilpin. *In re* Gilpin - - - - 1

I

Ilford Corporation, Smeaton *v.* 450
Inland Revenue Commissioners, A. J. Mucklow Ld. (in liquidation) *v.* - 615
Inland Revenue Commissioners, Camille and Henry Dreyfus Foundation Inc. - 672
Inland Revenue Commissioners, Gaddum *v.* *In re* Joynson's Will Trusts - 567
Inland Revenue Commissioners, Iveagh, *v.* - - 364
Inland Revenue Commissioners *v.* Universal Grinding Wheel Co. Ld. - - 117
Iveagh *v.* Inland Revenue Commissioners - - - 364

J

Jones, Hatton *v.* *In re* Mitchell, decd. - - - 525
Jordan, Heasman *v.* - - 744
Joynson's Will Trusts, *In re* Gaddum *v.* Inland Revenue Commissioners - - - 567

K

Koettgen's Will Trusts, *In re.* Westminster Bank Ld. *v.* Family Welfare Association Trustees Ld. - - 252

L

Lloyds Bank Ld. *v.* Rees. *In re* Rees, decd. - - 202

PAGE

Lockhart, Blizzard *v.* *In re* Wright - - - - 347
Lucas, Grace *v.* *In re* Wilson, decd. - - - - 733

M

McLaren, Public Trustee *v.* *In re* Sanders' Will Trusts 265
McLaughlin *v.* Town Investments Ld. *In re* Town Investments Ld. Underlease - - - - - 301
Midland Bank Executor and Trustee Co. Ld., Allan *v.* *In re* Allan - - - 295
Miller *v.* Thornton-Jones. *In re* Dargie, decd. - - 16
Minister of Health *v.* Royal Midland Counties Home for Incurables - - - 530
Mitchell, decd., *In re.* Hatton *v.* Jones - - - 525
Mucklow (A. & J.) Ld. (in liquidation) *v.* Inland Revenue Commissioners - 615
Mulhens, R. J. Reuter Co. Ld. *v.* - - - - - 98
Musicians' Union, Bonsor *v.* 479

O

Old Silkstone Collieries Ld., *In re* - - - - - 169

P

Pearce, Trevenen *v.* *In re* Sherman, decd. - - 653
Pearce, Trevenen *v.* *In re* Walters, decd. - - - 653
Piskor, Church of England Building Society *v.* - - 553
Prince, Dean *v.* - - - 409
Public Trustee *v.* Ash. *In re* Greaves - - - - - 434
Public Trustee *v.* McLaren. *In re* Sanders' Will Trusts 265

R

Rees, decd., *In re.* Lloyds Bank *v.* Rees - - - 202
Reuter (R. J.) Co. Ld. *v.* Mulhens - - - - 50

PAGE

Royal Midland Counties Home for Incurables, Minister of Health *v.* - - - - 530
Runcorn Urban District Council, Tithe Redemption Commission *v.* - - - 383

S

Sanders' Will Trusts, *In re.* Public Trustee *v.* McLaren 265
Sharkey *v.* Wernher - - 713
Sherman, decd., *In re.* Trevenen *v.* Pearce - - 653
Smeaton *v.* Ilford Corporation - - - - - 450
Spensley's Will Trusts, *In re.* Barclays Bank Ld. *v.* Staughton - - - - 233
Staughton, Barclays Bank Ld. *v.* *In re* Spensley's Will Trusts - - - 233

T

Taylor *v.* Adlard. *In re* Adlard - - - - 29
Thornton-Jones, Miller *v.* *In re* Dargie, decd. - - 16
Tithe Redemption Commission *v.* Runcorn Urban District Council - - 383

PAGE

Town Investments Ld. Underlease, *In re.* McLaughlin *v.* Town Investments Ld. 301
Trevenen *v.* Pearce. *In re* Sherman, decd. - - 653
Trevenen *v.* Pearce. *In re* Walters, decd. - - - 653

U

Universal Grinding Wheel Co. Ld., Inland Revenue Commissioners *v.* - - 117

W

Wallbridge *v.* Dorset County Council - - - - 659
Walters, decd., *In re.* Trevenen *v.* Pearce - - 653
Wernher, Sharkey *v.* - - 713
Westminster Bank Ld. *v.* Family Welfare Association Trustees Ld. *In re* Koettgen's Will Trusts - - 252
Wheatcroft Bros. Ld.'s Trade Marks, *In re* - - - 210
Wilson, decd., *In re.* Grace *v.* Lucas - - - - 733
Woodward *v.* Earl of Dudley 283
Wright, *In re.* Blizard *v.* Lockhart - - - - 347

TABLE OF CASES CITED AND JUDICIALLY NOTICED IN THIS PART

ABBREVIATIONS

Aff. affirmed
Appl. applied
Appr. approved
C. considered

D. disapproved
Dist. distinguished
E. explained
F. followed

N.F. not followed
O. overruled
Q. questioned

R. referred to in judgment
Rev. reversed

			Page
Abbott *v.* Sullivan	[1952] 1 K.B. 189	*R.*	512
Airedale Co-operative Worsted Manufacturing Society Ld., *In re*	[1933] Ch. 639		319
Allcard *v.* Walker	[1896] 2 Ch. 369	*R.*	38
Allen, *In re*, Faith *v.* Allen	[1953] Ch. 810	*C.*	260, 263
Alves *v.* Hodgson	7 T.R. 241	*R.*	149, 150, 152
Amalgamated Society of Carpenters, Cabinet Makers and Joiners *v.* Braithwaite; General Union of Operative Carpenters and Joiners *v.* Ashley	[1922] 2 A.C. 440	*Dist.*	480, 491, 492, 509, 521
Amalgamated Society of Railway Servants *v.* Osborne	[1910] A.C. 87	*R.*	495, 509, 516
Amand *v.* Bradbourne	2 Ch.Cas. 87, 138		19, 22
Andros, *In re*	24 Ch.D. 637	*C.*	733, 742
Arab Bank Ld. *v.* Barclays Bank (Dominion, Colonial and Overseas)	[1953] 2 Q.B. 527		134
Aristoc Ld. *v.* Rysta Ld.	[1945] A.C. 68	*R.*	85
Armstrong Whitworth Securities Co. Ld., *In re*	[1947] Ch. 673		134, 579
Art Reproduction Co. Ld., *In re*	[1952] Ch. 89	*R.*	160, 166
Ashton, *In re*	[1938] Ch. 482	*Appl.*	234, 246, 249, 251
Assam Railways and Trading Co. *v.* Commissioners of Inland Revenue	[1935] A.C. 445		136
Astor *v.* Perry	[1935] A.C. 398		677
Attorney-General *v.* Brown	1 Swanst. 265		678
Attorney-General *v.* Charlton	1 Ex.D. 204; 2 Ex.D. 398	*Dicta Appl.*	324, 345
Attorney-General *v.* Clarkson	[1900] 1 Q.B. 156	*R.*	696
Attorney-General *v.* Cohen	[1937] 1 K.B. 478	*R.*	81
Attorney-General *v.* De Keyser's Royal Hotel Ld.	[1920] A.C. 508	*Appl.*	316, 323, 324
Attorney-General *v.* Dorking Guardians	20 Ch.D. 595	*R.*	472
Attorney-General *v.* Lewes Corporation	[1911] 2 Ch. 495		456
Attorney-General *v.* Lutwydge	Bunb. 280	*R.*	146
Attorney-General *v.* Wood	[1897] 2 Q.B. 102	*R.*	697
Attorney-General for Canada *v.* Schulze	9 Sc.L.T. 4	*R.*	151, 164
Attwater *v.* Attwater	18 Beav. 330	*C.*	40, 46, 48, 49
Baird *v.* Wells	44 Ch.D. 661	*R.*	512
Balfour *v.* Kensington Gardens Mansions Ld.	49 T.L.R. 29	*R.*	312
Bank voor Handel en Scheepvaart N.V. *v.* Slatford	[1953] 1 Q.B. 248, 279	*C.*	53, 96
Bank voor Handel en Scheepvaart N.V. *v.* Slatford	[1953] 1 Q.B. 248		319
Banque des Marchands de Moscou (Koupetschesky) *v.* Kindersley	[1951] Ch. 112	*Appl.*	316, 329, 330, 332
Banque des Marchands de Moscou (Koupetschesky), *In re*	[1952] W.N. 151		318
Banque Industrielle de Moscou, *In re*	[1952] Ch. 919		317
Barker *v.* Herbert	[1911] 2 K.B. 633	*R.*	462

Barnard *v.* National Dock Labour Board	[1953] 2 Q.B. 18	*R.*	486
Barrow Haematite Steel Co., *In re*	[1900] 2 Ch. 846		179
Bartleman *v.* Murchison	2 Russ. & M. 136	*Appl.*	260, 264, 265
Baynton *v.* Morgan	22 Q.B.D. 74		578
Bebington's Tenancy, *In re*	[1921] 1 Ch. 559	*F.*	283, 288
Bedford (Duke of) *v.* Ellis	[1901] A.C. 1		489
Belcher *v.* Reading Corporation	[1950] Ch. 380	*R.*	271
Belmont & Co. Ld., *In re*	[1952] Ch. 10		318
Bendall *v.* McWhirter	[1952] 2 Q.B. 466	*R.*	278
Berkeley *v.* Berkeley	[1946] A.C. 555	*C.*	1, 2, 8, 12
Bernard *v.* Reed	1 Esp. 91	*R.*	148
Berridge, *In re*	63 L.T. 470		255
Betts, *In re*	[1949] W.N. 91	*R.*	89
Bignold, *Ex p.*	2 Deac. & Ch. 398	*R.*	280
Birmingham and District Land Co. *v.* London and North Western Railway Co.	40 Ch.D. 268	*Appl.*	171, 190
Birmingham Vinegar Brewery Co. *v.* Powell	[1897] A.C. 710		67
Blackburn Philanthropic Assurance Co. Ld., *In re*	[1914] 2 Ch. 430		318
Blackpool Corporation *v.* Locker	[1948] 1 K.B. 349	*R.*	77
Blair *v.* Deakin	57 L.T. 522		456
Boarland (Inspector of Taxes) *v.* Madras Electric Supply Corporation	[1953] 1 W.L.R. 920		319
Boarland (Inspector of Taxes) *v.* Madras Electric Supply Corporation	[1954] 1 W.L.R. 87		527
Bosworthick *v.* Clegg	45 T.L.R. 438		297
Boucher *v.* Lawson	Cas.t.Hard. 85	*R.*	146
Bowden, *In re*	[1936] Ch. 71	*C.*	29, 37
Bradford Navigation Co., *In re*	L.R. 5 Ch. 600		320
Bramwell *v.* Bramwell	[1942] 1 K.B. 370	*R.*	278
Bristow *v.* Sequeville	5 Exch. 275	*R.*	149, 150, 152
Briton Ferry Steel Co. Ld. *v.* Barry	[1940] 1 K.B. 463; 23 T.C. 414	*Appl.*	714, 721, 722, 724, 726–32
Brock (H. N.) & Co. Ld., *In re*	[1910] 1 Ch. 130		213
Brooks' Settlement Trusts, *In re*	[1939] Ch. 993	*R.*	38
Brophy, *In re*	[1949] N.Z.L.R. 1006	*C.*	733, 743
Brumfitt *v.* Roberts	L.R. 5 C.P. 224		393
Bullmore *v.* Wynter	22 Ch.D. 619	*R.*	298
Burnfiel *v.* Burnfiel	[1926] 2 D.L.R. 129	*C.*	733, 743
Butler Estates Co. *v.* Bean	[1942] 1 K.B. 1		578
Calow, *In re*	[1928] Ch. 710	*R.*	657
Campbell Coverings Ld., *In re*	[1953] Ch. 488	*F.*	225, 228, 229, 232
Canadian Pacific Railway Co. *v.* Roy	[1902] A.C. 220	*R.*	162
Cape Brandy Syndicate *v.* Inland Revenue Commissioners	[1921] 2 K.B. 403	*Appl.*	673, 696, 699, 711
Cawston's Conveyance, *In re*, and School Sites Act, 1841	[1940] Ch. 27		385
Chamberlayne *v.* Brockett	L.R. 8 Ch. 206		357
Charing Cross Electricity Supply Co. *v.* Hydraulic Power Co.	[1914] 3 K.B. 772	*R.*	469, 476
Charlton *v.* Attorney-General	4 App.Cas. 427	*Dicta. Appl.*	324, 345
Cholmeley School, Highgate, Wardens, etc., of *v.* Sewell	[1894] 2 Q.B. 906	*R.*	308
Clegg *v.* Levy	3 Camp. 166	*R.*	152
Cloncurry's Estate, *In re*	[1932] I.R. 687	*R.*	374, 375, 376
Clugas *v.* Penaluna	4 T.R. 466	*R.*	148
Cockerill, *In re*	[1929] 2 Ch. 131		42
Colchester *v.* Peck	[1926] 2 K.B. 366; 42 T.L.R. 535	*C.*	99, 110–13
Collier *v.* Mason	25 Beav. 200	*Appl.*	409, 418, 427, 430

Collier (H.) & Sons Ld. *v.* Inland Revenue Commissioners	[1933] 1 K.B. 488; 18 T.C. 83	*N.F.*	616, 625, 628, 629, 631–7, 641–3, 646, 648, 650–2
Colorado, State of *v.* Harbeck	232 N.Y. 71		135
Colquhoun *v.* Heddon	25 Q.B.D. 129	*R.*	701, 702
Colville Estate Ld. *v.* Inland Revenue Commissioners	[1930] 2 K.B. 393	*R.*	635
Commissioners for Land Tax for the City of London *v.* Central London Railway Co.	[1913] A.C. 364		390
Commissioners for Special Purposes of Income Tax *v.* Pemsel	[1891] A.C. 531	*R.*	242
Company, A, *In re*	[1915] 1 Ch. 520		320
Compton, *In re*	[1945] Ch. 123	*R.*	258
Connolly Bros. Ld. (No. 2), *In re*, Wood *v.* The Company	[1912] 2 Ch. 25	*Dist.*	554, 562, 564, 566
Corbett *v.* Corbett	14 P.D. 7	*R.*	49
Corelli, *In re*	[1943] Ch. 332	*R.*	243
Cotton *v.* The King	[1914] A.C. 176		139
Coulthurst, *In re*	[1951] Ch. 661	*R.*	271
Coventry Permanent Economic Building Society *v.* Jones	[1951] 1 T.L.R. 739; [1951] 1 All E.R. 901	*D.*	554, 557, 559, 560, 562, 564, 566
Coverdale *v.* Charlton	4 Q.B.D. 104	*R.*	398, 399, 402
Craig's Claim	[1895] 1 Ch. 267	*C.*	577, 590, 598, 599, 601, 602
Cranbux Ld., *In re* the Application of	[1928] Ch. 829		70
Crawshay, *In re*	[1948] Ch. 123	*R.*	440
Crigglestone Coal Co. Ld., *In re*	[1906] 2 Ch. 327		319
Cuthbertson *v.* Irving	4 H. & N. 742		557
Daimler Co. Ld. *v.* Continental Tyre & Rubber Co. (Great Britain) Ld.	[1916] 2 A.C. 307	*R.*	93
Daniel *v.* Ubley	Jones (W.) 137	*R.*	46
David Carlaw & Sons Ld. *v.* Inland Revenue Commissioners	1926 S.C. 870		624
Davidson, *In re*	[1909] 1 Ch. 567	*R.*	237, 243, 244, 249
Dean, *In re*, Cooper-Dean *v.* Stevens	41 Ch.D. 552		138
Dean *v.* Prince	[1953] Ch. 590	*partly Rev.*	409
Delhi Electric Supply and Traction Co. Ld., *In re*	The Times, July 31, 1953	*Aff.*	132
Dendre Valley Railway and Canal Co., *In re*	19 L.J.Ch. 474		319
Diamantidi *v.* Grosvenor Securities, Ld.	[1937] 1 All E.R. 703		414
Dilke, *In re*	[1921] 1 Ch. 34	*R.*	342, 343
Doe *d.* Armstrong *v.* Wilkinson	12 A. & E. 743	*R.*	288
Doe *d.* Cox *v.* Roe	4 Esp. 185	*R.*	288
Doe *d.* Gill *v.* Pearson	6 East 173	*N.F.*	40, 45–8
Doe *d.* Rodd *v.* Archer	14 East 245	*R.*	288
Donald, *In re*	[1929] 2 D.L.R. 244		735
Dore *v.* Gray	2 T.R. 358	*R.*	697
Doré Gallery Ld., *In re*	[1891] W.N. 98		227
Dorman, Long & Co. Ld., *In re*	[1934] Ch. 635	*Appl.*	171, 190
Dracup *v.* Radcliffe	27 T.C. 188	*Appl.*	745, 751
Drummond, *In re*	[1914] 2 Ch. 90	*R.*	258
Dublin Corporation *v.* M'Adam	2 T.C. 387	*R.*	729
Dudgeon, *In re*	74 L.T. 613	*R.*	272
Dugdale, *In re*	38 Ch.D. 176		42
Dunn, *In re*	[1904] 1 Ch. 648		19
Dunn *v.* Birmingham Canal Co.	L.R. 8 Q.B. 42	*R.*	476
Dunne *v.* Byrne	[1912] A.C. 407	*Appl.*	234, 243, 244, 246, 249
Dynamit Actiengesellschaft *v.* Rio Tinto Co.	[1918] A.C. 260		320
Earl Fitzwilliams' Wentworth Estates Co. *v.* Minister of Housing and Local Government	[1952] A.C. 362	*R.*	77

Eastern and South African Telegraph Co. Ld. *v.* Cape Town Tramways Cos. Ld.	[1902] A.C. 381		460
Ecroyd *v.* Coulthard	[1897] 2 Ch. 554	*R.*	525
Ellenborough, *In re*	[1903] 1 Ch. 697	*R.*	37, 38
Elphinstone (Lord) *v.* Monkland Iron and Coal Co. Ld.	11 App.Cas. 332	*Dist.*	577, 600, 604–10
Employers' Liability Assurance Corporation *v.* Sedgwick, Collins & Co.	[1927] A.C. 95		320
English, Scottish and Australian Chartered Bank, *In re*	[1893] 3 Ch. 385		320
Eva, The	[1921] P. 454		137
Eve, *In re*	[1909] 1 Ch. 796	*Appl.*	1, 2, 14, 15
Ewart *v.* Fryer	[1901] 1 Ch. 499	*R.*	308
Fairclough (T. M.) & Sons Ld. *v.* Berliner	[1931] 1 Ch. 60	*R.*	290
Ferris *v.* Weaver	[1952] 2 All E.R. 233	*R.*	278
Finnegan *v.* Allen	[1943] K.B. 425	*R.*	427
Fletcher, *In re*	[1949] Ch. 473	*Appl.*	1, 2, 14
Fletcher, *In re*	[1949] Ch. 473	*C.*	733, 743
Fletcher *v.* Rylands	L.R. 1 Ex. 265	*R.*	458, 465, 466
Flinn, *In re*	[1948] Ch. 241	*Dist.*	234, 239, 240, 243–6, 249
Flower, *In re*	55 L.J.Ch. 200		339
Foley's Charity Trustees *v.* Dudley Corporation	[1910] 1 K.B. 317	*E.*	384, 386, 398, 401, 402, 403, 408
Food Controller *v.* Cork	[1923] A.C. 647	*Appl.*	316, 325
Foster *v.* Driscoll	[1929] 1 K.B. 470		136
Foster *v.* Warblington U.D.C.	[1906] 1 K.B. 648	*R.*	467, 468
Garfitt *v.* Allen	37 Ch.D. 48		276
Garrard, *In re*	[1907] 1 Ch. 382	*R.*	245
Garrett, *In re*	[1934] Ch. 477	*R.*	207
Gartness Iron Co., *In re*	L.R. 10 Eq. 412		578
Geikie, *In re*	27 T.L.R. 484	*R.*	363
General Rolling Stock Co., *In re*	L.R. 7 Ch. 646	*R.*	133, 167, 168
General Union of Operative Carpenters and Joiners *v.* Ashley	[1922] 2 A.C. 440	*Dist.*	480, 521
Giles *v.* Randall	[1915] 1 K.B. 290	*R.*	20
Gilmour *v.* Coats	[1949] A.C. 426	*R.*	258
Glenboig Union Fireclay Co. Ld. *v.* Inland Revenue Commissioners	12 T.C. 427	*R.*	729, 749
Glossop *v.* Heston and Isleworth Local Board	12 Ch.D. 102	*R.*	472, 474
Glyn Will Trusts, *In re*	[1950] W.N. 373; 66 T.L.R. (Pt. 2) 510	*Dist.*	266, 272
Gooch *v.* London Banking Association	32 Ch.D. 41	*R.*	159, 165
Gooch *v.* London Banking Association	32 Ch.D. 41	*C.*	577, 587, 590, 591, 599, 603
Goodman's Trusts, *In re*	17 Ch.D. 266	*C.*	733, 742
Goodman *v.* Mayor of Saltash	7 App.Cas. 633	*R.*	273
Green & Sons (Northampton) Ld. *v.* Morris	[1914] 1 Ch. 562	*R.*	90
Green (H. E.) & Sons *v.* Minister of Health (No. 2)	[1948] 1 K.B. 34	*Dist.*	266, 270
Green *v.* The Chelsea Waterworks Co.	70 L.T. 547	*R.*	470, 475, 476, 477
Greer *v.* Kettle	[1938] A.C. 156		556
Grell *v.* Levy	16 C.B.N.S. 73		320
Gresham Life Assurance Society *v.* Styles	[1892] A.C. 309	*R.*	729
Gutta Percha Corporation, *In re*	[1900] 2 Ch. 665		227
Hadden, *In re*	[1932] 1 Ch. 133		679
Haigh *v.* Dendraeth R.D.C.	[1945] 2 All E.R. 661	*R.*	467
Halsey *v.* Brotherhood	15 Ch.D. 514		70

Hammond *v.* Vestry of St. Pancras	L.R. 9 C.P. 316	*Appl.*	451, 468, 474, 477
Hankey *v.* Clavering	[1942] 2 K.B. 326	*R.*	289
Hanley, In the Estate of	[1942] P. 33		527
Hardie & Lane Ld. *v.* Chiltern	[1928] 1 K.B. 663	*R.*	496, 512
Hardy *v.* Fothergill	13 App.Cas. 351	*R.*	588–91, 594, 599, 600–3, 610
Harrington (Earl of) *v.* Derby Corporation	[1905] 1 Ch. 205	*R.*	472, 474
Hawthorn Corporation *v.* Kannuluik	[1906] A.C. 105; [1924] 1 K.B. 264n.		456
Haycraft Gold Reduction and Mining Co., *In re*	[1900] 2 Ch. 230		227
Hay's Judicial Factor *v.* Hay's Trustees	1952 S.C. (H.L.) 29	*R.*	355
Haytor Granite Co., *In re*	L.R. 1 Ch. 77		578
Henley & Co., *In re*	9 Ch.D. 469		320
Henry *v.* Foster	16 T.C. 605; 145 L.T. 225		749
Henry *v.* Sargent	13 New Hamp. 321	*R.*	145, 156
Herbert *v.* McQuade	[1902] 2 K.B. 631		749
Hertfordshire County Council *v.* Lea Sand Ld.	98 J.P. 109	*R.*	390, 397
Hesketh *v.* Birmingham Corporation	[1924] 1 K.B. 260	*R.*	472
Higginson and Dean, *In re*	[1899] 1 Q.B. 325		318
Hill *v.* Crook	L.R. 6 H.L. 265	*Appl.*	1, 2, 12, 13, 14
Hobart *v.* Southend-on-Sea Corporation	75 L.J.K.B. 305	*R.*	466, 474
Hobourn Aero Components Ld.'s Air Raid Distress Fund, *In re*	[1946] Ch. 194	*R.*	258
Hodgson, *In re*	[1913] 1 Ch. 34	*F.*	202, 208, 209
Holman *v.* Johnson	1 Cowp. 341	*E.*	131, 147–51
Home *v.* Pillans	2 M. & K. 15		262
Home and Colonial Insurance Co., *In re*	44 T.L.R. 718		318
Horsey's Claim	L.R. 5 Eq. 561	*R.*	599
Houlder Bros. & Co. *v.* Gibbs	[1925] Ch. 575	*R.*	311, 312
House Property and Investment Co. *v.* Bernardout	[1948] 1 K.B. 314		578
Howson *v.* Buxton	97 L.J.K.B. 749	*R.*	290
Hoystead *v.* Commissioner of Taxation	[1926] A.C. 155	*R.*	352, 358
Hudson (John) & Co. *v.* Kirkness	[1953] 1 W.L.R. 749		676
Huish's Charity, *In re*	L.R. 10 Eq. 5	*R.*	440
Humphries *v.* Cousins	2 C.P.D. 239	*R.*	466, 470, 471
Hunt *v.* Luck	[1902] 1 Ch. 428		277
Huntington *v.* Attrill	[1893] A.C. 150		135
Impex Electrical Ld. *v.* Weinbaum	44 R.P.C. 405	*R.*	89
Income Tax Commissioners for Special Purposes *v.* Pemsel	[1891] A.C. 531; 3 T.C. 53	*Appl.*	673, 684, 698, 704, 711
Infant, An, *In re*	[1934] N.S.W., S.R. 349	*C.*	733, 743
Inland Revenue Commissioners *v.* City of Glasgow Police Athletic Association	[1953] A.C. 380		676
Inland Revenue Commissioners *v.* Clay	[1914] 3 K.B. 466		413
Inland Revenue Commissioners *v.* Crossman	[1937] A.C. 26		411
Inland Revenue Commissioners *v.* Dalgety & Co. Ld.	[1930] A.C. 527		679
Inland Revenue Commissioners *v.* Dowdall, O'Mahoney & Co. Ld.	[1952] A.C. 401	*Appl.*	673, 688, 697, 698, 711
Inland Revenue Commissioners *v.* Gull	21 T.C. 374	*C.*	673, 680, 687, 694, 695, 709, 710
Inland Revenue Commissioners *v.* Muller & Co.'s Margarine Ld.	[1901] A.C. 217	*R.*	96

Inland Revenue Commissioners *v.* National Anti-Vivisection Society	[1948] A.C. 31 .		 677
Inland Revenue Commissioners *v.* National Mortgage and Agency Company of New Zealand	[1938] A.C. 524 .		 136
Inland Revenue Commissioners *v.* Universal Grinding Wheel Co. Ld.	[1953] Ch. 499 .	*Aff.*	 117
Inland Revenue Commissioners *v.* William Ransom & Son Ld.	12 T.C. 21 . .	*R.*	. . 724, 725, 732
Inland Revenue Commissioners *v.* Yorkshire Agricultural Society	[1928] 1 K.B. 611	*R.*	 700
Iveagh (Earl of) *v.* Inland Revenue Commissioners	[1930] I.R. 386 .	*R.*	 371
Iveagh *v.* Inland Revenue Commissioners	[1954] Ch. 364 .	*Dist.*	. 567, 574, 575
Jacobs *v.* Brett	L.R. 20 Eq. 1 .	*R.*	 48
James, *In re*	[1932] 2 Ch. 25 .		 356
James Smith & Sons (Norwood) Ld. *v.* Goodman	[1936] Ch. 216 .	*F.*	. 577, 584, 587, 588, 590, 596, 603, 615
James *v.* Catherwood . . .	3 Dowl. & Ry. 190	*R.*	 149
James *v.* Institute of Chartered Accountants	98 L.T. 225 . .		 482
Jefferys *v.* Boosey	4 H.L.C. 815 .	*R.*	. . . 681, 701
Job Edwards Ld. *v.* Birmingham Navigation Proprietors	[1924] 1 K.B. 341		 459
John Sinclair Ld.'s Trade Mark, *In re*	[1932] 1 Ch. 598 .		 70
Johnson *v.* Chestergate Hat Manufacturing Ld.	[1915] 2 Ch. 338 .		 414
Jones *v.* Llanrwst U.D.C. . .	[1911] 1 Ch. 393 .	*R.*	. . 467, 472, 474
Jones' Settlement, *In re* . . .	[1915] 1 Ch. 373 .	*O.*	. 434, 439, 444, 445, 448, 449
Jorden *v.* Money	5 H.L.C. 185 .	*R.*	 190
Jubilee Sites Syndicate (1897), *In re*	[1899] 2 Ch. 204 .	*R.*	 230
Kahler *v.* Midland Bank Ld. . .	[1948] 1 All E.R. 811; [1950] A.C. 24, 29	*R.*	. 153, 154, 158, 164, 165
Kay's Settlement, *In re* . . .	[1939] Ch. 329 .	*R.*	 38
Keeves *v.* Dean	[1924] 1 K.B. 685	*R.*	 278
Kekewich *v.* Manning . . .	1 De G.M. & G. 176	*R.*	 37
Kelly *v.* National Society of Operative Printers' Assistants	84 L.J.K.B. 2236; 113 L.T. 1055	*Appl.*	480, 490, 491, 492, 493, 494, 496, 497, 498, 499, 500, 504, 505, 507, 512, 513, 514, 515, 516, 518, 519, 520, 521, 522, 524, 525
Kloebe, *In re*	28 Ch.D. 175, 180	*Appl.*	. . 316, 333
Knowles *v.* Scott	[1891] 1 Ch. 717 .		 138
Koenigsberg, In re	[1949] Ch. 348 .	*C.*	. 348, 352, 353, 357, 358, 359
Krasnapolsky Restaurant and Winter Garden Co., *In re*	[1892] 3 Ch. 174 .		 227
Lacteosote Ld. *v.* Alberman . .	[1927] 2 Ch. 117 .	*C.*	. . 52, 84, 85
Lawes *v.* Bennett	1 Cox Eq.Cas. 167	*C.*	. . . 654, 658
Laycock *v.* Freeman, Hardy & Willis Ld.	[1939] 2 K.B. 1 .	*Appl.*	713, 721, 724–6, 729–32
Lazard Bros. *v.* Banque Industrielle de Moscou	[1932] 1 K.B. 617		 320
Leather Cloth Company *v.* American Leather Cloth Company	11 H.L.C. 523 .	*R.*	 85
Lecouturier *v.* Rey	[1910] A.C. 262 .	*R.*	 89
Lee *v.* K. Carter Ld. . . .	[1949] 1 K.B. 85 .	*R.*	 313
Lee *v.* Showmen's Guild of Great Britain	[1952] 2 Q.B. 329	*R.*	. . . 427, 486
Leonard & Ellis's Trade Mark, *In re*	26 Ch.D. 288 .		 213

Littlewood *v.* George Wimpey & Co. and British Overseas Airways Corporation	[1953] 3 W.L.R. 553		134
Lloyd, *Ex p.*	1 Sim.N.S. 248	*R.*	697
Lloyd Generale Italiano, *In re*	29 Ch.D. 219		320
Lloyds Bank *v.* Trustee of the Property of O.	[1953] 1 W.L.R. 1460	*Appl.*	275, 279, 281, 282
Loudon *v.* Ryder (No. 2)	[1953] Ch. 423	*R.*	75
London and Colonial Co., *In re*	L.R. 5 Eq. 561		578
London Association for Protection of Trade *v.* Greenlands Ld.	[1916] 2 A.C. 15	*R.*	512, 513
Lorillard, *In re*	[1922] 2 Ch. 638	*Appl.*	132, 160, 161, 166, 168
Lucas, *In re*	[1922] 2 Ch. 52	*R.*	272
Luck's Settlement Trusts, *In re*	[1940] Ch. 864	*C.*	733, 742
Macleay, *In re*	L.R. 20 Eq. 186	*N.F.*	40, 47, 48, 50
Mair, *In re*	[1935] Ch. 562	*R.*	208
Maldonado, In the Estate of	[1953] 3 W.L.R. 204; [1954] 2 W.L.R. 64		527
Markham *v.* Markham	63 T.L.R. 91; [1946] 2 All E.R. 737	*Dist.*	99, 105, 109–11, 113
Marjoribanks' Trust Deed, *In re*	[1952] Ch. 181		532
Marlborough (Duke) *v.* Attorney-General (No. 1)	[1945] Ch. 78	*R.*	369, 370, 373
Marshall, *In re*	[1914] 1 Ch. 192		43
Maryland *v.* Turner	132 N.Y. 173		139
Matheson Bros. Ld., *In re*	27 Ch.D. 225		319
McIntyre *v.* Hardcastle	[1948] 2 K.B. 82	*R.*	290
Medical Battery Co., *In re*	[1894] 1 Ch. 444	*R.*	231
Medway River Navigation Company *v.* Romney (Earl)	9 C.B.N.S. 575		393
Meek *v.* Kettlewell	1 Hare 464	*R.*	37, 38
Merton, *In re*	[1953] 1 W.L.R. 1096	*R.*	440
Metropolis Estates Co. Ld. *v.* Wilde	[1940] 2 K.B. 536	*C.*	577, 594–8
Metropolitan Asylum District Managers *v.* Hill	6 App.Cas. 193	*R.*	455, 477
Meux *v.* Smith	11 Sim. 410	*R.*	564, 565
Milwaukee County *v.* M. E. White Co.	296 U.S. 268	*R.*	157
Minister of Health *v.* General Committee of the Royal Midland Counties Home for Incurables	[1954] 1 W.L.R. 79	*Rev.*	530
Mitchell *v.* Henry	15 Ch.D. 181		66
M'Keown *v.* Roe	[1928] I.R. 195	*Appl.*	745, 750, 751
Montague Burton Ld. *v.* Inland Revenue Commissioners	20 T.C. 48	*F.*	616, 647
Moon's Will Trusts, *In re*	[1948] W. N. 55; 64 T.L.R. 123	*Appr.*	348, 354, 355, 360, 361, 362, 363
Morgan *v.* Hardy	18 Q.B.D. 646		578
Mornington Permanent Building Society *v.* Kenway	[1953] Ch. 382	*R.*	562
Morrison, *In re*	40 Ch.D. 30		297
Mouson & Co. *v.* Boehm	26 Ch.D. 398		68
Münster (Enemy), *In re*	[1920] 1 Ch. 268	*R.*	93
Municipal Council of Sydney *v.* Young	[1898] A.C. 457		385
Muschamp *v.* Bluet	Bridg. (J.) 132	*R.*	44, 48, 49
Naamlooze Vennootschap Handelmaatschappij Wokar, *In re*	[1946] Ch. 98		320
National Debenture and Assets Corporation, *In re*	[1891] 2 Ch. 505		227
National Union of General and Municipal Workers *v.* Gillian	[1946] K.B. 81; [1945] 2 All E.R. 593	*Dist.*	480, 500, 501, 503, 504, 510, 512, 524

Nestlé & Co. Ld. *v.* Inland Revenue Commissioners	[1953] Ch. 395		677
New Oriental Bank Corporation (No. 2), *In re*	[1895] 1 Ch. 753	*C.*	577, 595–8
New South Wales Taxation Commissioners *v.* Palmer	[1907] A.C. 179		320
Nichols *v.* Marsland	L.R. 10 Ex. 255	*R.*	469
Nordenfelt *v.* Maxim Nordenfelt Guns and Ammunition Co. Ld.	[1894] A.C. 535		137
Nordisk Insulinlaboratorium *v.* Gorgate Products Ld. (sued as C. L. Bencard (1934) Ld.)	[1953] Ch. 430		67
Norman, *In re*	[1947] Ch. 349	*R.*	245
North Carolina Estate Co. Ld., *In re*	5 T.L.R. 328		138
Northumberland (Duke of), *In re*	[1951] Ch. 202	*F.*	24, 25, 27, 28
Oppenheimer *v.* British and Foreign Exchange and Investment Bank	6 Ch.D. 744	*C.*	577, 599, 602
Oppenheim *v.* Tobacco Securities Trust Co. Ld.	[1951] A.C. 297	*Dist.*	253, 258
Oriental Bank Corporation, *In re*	54 L.J.Ch. 481		321
Oriental Inland Steam Co., *In re*	L.R. 9 Ch. 557		138
Ormond Investment Co. Ld. *v.* Betts	[1928] A.C. 143	*Appl.*	673, 687–9, 696, 699, 711
Osborne *v.* Amalgamated Society of Railway Servants	[1911] 1 Ch. 540	*R.*	487, 491, 492, 493, 497, 498, 499, 519, 520
Pappa *v.* Rose	L.R. 7 C.P. 32	*R.*	427
Panther Lead Co., *In re*	[1896] 1 Ch. 978	*R.*	589
Paulin (Sir William Thomas), In re	[1935] 1 K.B. 26		413
Payne's Declaration, *In re*	[1939] Ch. 865	*R.*	382
Pearson, *In re*	[1892] 2 Q.B. 263		677
Pearson, *In re*	[1946] V.L.R. 356	*C.*	733, 743
Penang and General Investment Trust Ld. *v.* Inland Revenue Commissioners	[1943] A.C. 486	*R.*	677, 699, 711
Philippart *v.* Wm. Whiteley Ld.	[1908] 2 Ch. 274		213
Phillips, *In re*	[1931] 1 Ch. 347	*R.*	342, 343
Planché *v.* Fletcher	1 Doug. 251	*R.*	147
Poole *v.* Pass	1 Beav. 600	*Dist.*	16, 21
Poole Firebrick and Blue Clay Co., *In re*	L.R. 17 Eq. 268		140
Portland *v.* Topham	11 H.L.C. 32	*R.*	439, 440, 444
Pratt *v.* Pratt	43 T.L.R. 523; 137 L.T. 491	*Dist.*	99, 105, 109–11, 113
Premier Confectionery (London) Co. *v.* London Commercial Sale Rooms	[1933] Ch. 904	*Appl.*	301, 313
Pride of Derby and Derbyshire Angling Association Ld. *v.* British Celanese Ld.	[1953] Ch. 149; [1952] 1 T.L.R. 1013	*Appl.*	451, 452, 463, 467, 470, 471, 474, 478
Prudential Assurance Co. Ld. *v.* Chatterley-Whitfield Collieries Ld.	[1949] A.C. 512	*Dist.*	170, 182, 201
Pulsford *v.* Devenish	[1903] 2 Ch. 625		134
Ralli Brothers *v.* Compañia Naviera Sota y Aznar	[1920] 2 K.B. 287	*R.*	154, 158
Read *v.* J. Lyons & Co. Ld.	[1945] K.B. 216; [1947] A.C. 156	*R.*	468, 471
Reddaway *v.* Banham	13 R.P.C. 218		66
Reddaway & Co. Ld. *v.* Irwell and Eastern Rubber Co. Ld.	24 R.P.C. 203		66
Rees, *In re*	[1920] 2 Ch. 59		239
Reuter (R. J.) Co. Ld. *v.* Mulhens	70 R.P.C. 102	*Aff.*	53
Rex *v.* Cheshire County Court Judge and United Society of Boilermakers; *Ex p.* Malone	[1921] 2 K.B. 694	*R.*	493, 496, 497, 513, 517, 518, 521
Rex *v.* Copestake	[1927] 1 K.B. 468	*C.*	99, 112, 113
Rey *v.* Lecouturier	27 R.P.C. 268		67
Rickards *v.* Lothian	[1913] A.C. 263	*R.*	468, 470, 471
Rigby *v.* Connol	14 Ch.D. 482	*R.*	487

River Steamer Co., *In re*; Mitchell's Claim	L.R. 6 Ch. 822		141
Robertson, decd., *In re*	[1949] 1 All E.R. 1042	*Appl.*	16, 23
Robinson, *In re*	[1931] 2 Ch. 122	*C.*	673, 684, 685, 704
Robinson *v.* Workington Corporation	[1897] 1 Q.B. 619	*R.*	472, 473
Rolls *v.* Vestry of St. George the Martyr, Southwark	14 Ch.D. 785	*E.*	384, 387, 398, 400, 402, 405
Rosher, *In re*	26 Ch.D. 801	*C.*	40, 48
Ross *v.* Fedden	L.R. 7 Q.B. 661	*R.*	470, 471
Ross *v.* Ross	129 Mass.R. 243	*C.*	733, 743
Royal Baking Powder Co. *v.* Wright, Crossley & Co.	18 R.P.C. 95	*R.*	74
Royal Victoria Hospital, Dundee *v.* Wheatley	(Unreported)	*Appr.*	530, 543, 552
Rudow *v.* Great Britain Mutual Life Assurance Society	17 Ch.D. 600	*R.*	325
Russell *v.* Amalgamated Society of Carpenters and Joiners	[1912] A.C. 421	*R.*	494, 516
Russell, Cordner & Co., *In re*	[1891] 3 Ch. 171		227
Russian and English Bank, *In re*	[1932] 1 Ch. 663		319
Russian and English Bank *v.* Baring Bros. & Co. Ld.	[1936] A.C. 405	*Appl.*	316, 326–8
Russian Bank for Foreign Trade, *In re*	[1933] Ch. 745		317
Russian Commercial and Industrial Bank *v.* Comptoir d'Escompte de Mulhouse	[1925] A.C. 112		321
Russo-Asiatic Bank, *In re*	[1934] Ch. 720		320
Rylands *v.* Fletcher	L.R. 3 H.L. 330	*C.*	451, 452, 461, 462, 465, 467, 468, 470, 472, 473, 474, 475, 476, 477, 478
Sablonière Hotel Co., *In re*	L.R. 3 Eq. 74		133
Salisbury (Marquess) *v.* Gilmore	[1942] 2 K.B. 38	*R.*	190
Samuelson *v.* Producers' Distributing Co. Ld.	[1932] 1 Ch. 201	*R.*	74
Sandeman's Will Trusts, *In re*	[1937] 1 All E.R. 368		43
Scarisbrick, *In re*	[1951] Ch. 622	*R.*	258
Schenk *v.* Agnew	4 K. & J. 105		262
Scottish Insurance Corporation Ld. *v.* Wilsons & Clyde Coal Co. Ld.	[1949] A.C. 462	*Dist.*	170, 182, 183, 200, 201
Sedleigh-Denfield *v.* O'Callaghan	[1940] A.C. 880	*R.*	462, 463
Selfridge's (Holdings) Ld.	(1945, unreported)	*R.*	192
Serpell & Co. Ld., *In re*	[1944] Ch. 233	*R.*	123
Shanly *v.* Ward	29 T.L.R. 714	*Appl.*	301, 313, 314
Sharkey *v.* Wernher	[1953] Ch. 782	*Rev.*	714
Shaw's Settlement, *In re*	[1951] Ch. 833	*F.*	202, 208, 209
Sheldrick *v.* South African Breweries Ld.	[1923] 1 K.B. 173		679
Shirley *v.* Fisher	47 L.T. 109	*C.*	434, 439, 444
Shrewsbury (Earl of) *v.* Scott	6 C.B.N.S. 1, 180	*R.*	697
Slaughter, *In re*	[1945] Ch. 355	*R.*	299
Slevin, *In re*	[1891] 2 Ch. 236	*Appl.*	348, 360, 361, 362, 363
Smith, Knight & Co., *In re*	L.R. 5 Eq. 223		133
Sneddon *v.* Lord Advocate	[1954] A.C. 257	*C.*	365, 381, 383
Société Le Ferment's Application	29 R.P.C. 497		216
Soley, *In re*	17 T.L.R. 118	*R.*	363
Somes, *In re*	[1896] 1 Ch. 250	*R.*	446
Spalding (A. G.) & Bros. *v.* A. W. Gamage Ld.	32 R.P.C. 273	*R.*	95
Spensley's Will Trusts, *In re*	[1952] Ch. 886	*Rev.*	234
Stimpson's Trusts, *In re*	[1931] 2 Ch. 77	*Dist.*	202, 208, 209
Strakosch, *In re*	[1948] Ch. 37	*R.*	251

Stretton's Derby Brewery Co. *v.* Mayor of Derby	[1894] 1 Ch. 431 .	*Appl.*	451, 452, 472, 477
Stuart *v.* Babington . . .	27 L.R.Ir. 551 .		 339
Stump *v.* Gaby	2 De G.M. & G. 623	*C.*	. . . 654, 658
Sutherland Settlement Trusts, *In re*	[1953] 2 W.L.R. 1163		 27
Sutton, *In re*	[1901] 2 Ch. 640 .	*Dist.*	. . 266, 270
Sydney Municipal Council *v.* Bull .	[1909] 1 K.B. 7 .	*R.*	. 145, 152, 156, 164
Taff Vale Railway *v.* Amalgamated Society of Railway Servants	[1901] A.C. 426 .	*Dist.*	480, 495, 497, 500, 501, 502, 503, 508, 509, 510, 512, 516, 517, 524
Telegraph Construction Co., *In re* .	L.R. 10 Eq. 384 .	*R.*	 599
Tenant *v.* Goldwin	1 Salk. 360 . .	*R.*	 467
Tendring Union *v.* Woolwich Union	[1923] 1 K.B. 121		 533
Thomas Fattorini (Lancashire) Ld. *v.* Inland Revenue Commissioners	[1942] A.C. 643 .	*C.*	. 616, 628, 630, 635, 636, 642, 645, 647, 648, 652, 653
Thompson *v.* Earthy . . .	[1951] 2 K.B. 596		 277
Thompson and Cottrell's Contract, *In re*	[1943] Ch. 97 .	*R.*	 308
Tingley *v.* Müller	[1917] 2 Ch. 144 .	*Appl.*	. . 275, 281
Tovarishestvo Manufactur Liudvig-Rabenek, *In re*	[1944] Ch. 404 .		 318
Tredegar (Viscount) *v.* Harwood .	[1929] A.C. 72 .	*R.*	 312
Trevor *v.* Whitworth . . .	12 App.Cas. 409 .	*R.*	 130
Trustees of British Museum *v.* White	2 Sim. & S. 594 .	*R.*	 698
Tunbridge Wells (Mayor, etc. of) *v.* Baird	[1896] A.C. 434 .	*E.*	. 384, 386, 398, 400, 401, 402
Turner *v.* London and South-Western Railway Co.	L.R. 17 Eq. 561 .	*R.*	 525
Turner's Will Trusts, *In re* . .	[1937] Ch. 15 .	*R.*	 206
Union Bank of Calcutta, *In re* .	3 De G. & Sm. 253		 319
Union Corporation Ld. *v.* Inland Revenue Commissioners	[1953] A.C. 482 .		 677
Universal Permanent Building Society *v.* Cooke	[1952] Ch. 95 .	*C.*	. . 554, 557–9
Vamvakas *v.* Custodian of Enemy Property	[1952] 2 Q.B. 183		 69
Varieties Ld., *In re* . . .	[1893] 2 Ch. 235 .		 227
Vatcher *v.* Paull	[1915] A.C. 372 .	*R.*	. . 440, 445, 446
Vaughan *v.* Vaughan . . .	[1953] 1 W.L.R. 236; [1953] 1 Q.B. 762	*R.*	 282
Verrall, *In re*	[1916] 1 Ch. 100 .	*R.*	 245
Visser, *In re*	[1928] Ch. 877 .	*Appl.*	. 131, 144, 152, 155, 162, 164, 166–8
Vocalion (Foreign) Ld., *In re* . .	[1932] 2 Ch. 196 .		 138
Walker *v.* Mottram	19 Ch.D. 355 .	*R.*	 90
Wallace *v.* Attorney-General . .	L.R. 1 Ch. 1 .	*R.*	. 369, 701, 703, 713
Wallis *v.* Griffiths	[1921] 2 Ch. 301 .	*R.*	 280
Walters *v.* Woodbridge . . .	7 Ch.D. 504 . .		 19
Walton, *Ex p.*	17 Ch.D. 746 .	*R.*	 309
Waters, *Ex p.*	L.R. 8 Ch. 562 .	*R.*	 591
Watson & Sons Ld., *In re* . .	[1891] 2 Ch. 55 .		 227
Watson Bros. *v.* Hornby . . .	24 T.C. 506 . .	*O.*	. 714, 720–4, 728, 731, 732
Watts, *In re*	[1931] 2 Ch. 302 .	*F.*	. . 334, 341–4
Waymell *v.* Reed	5 T.R. 599 . .	*R.*	 148
Weatherall & Co. Ld. *v.* Stone .	[1950] W.N. 572 .	*R.*	 290
Webb (H. J.) & Co. (Smithfield, London) Ld., *In re*	[1922] 2 Ch. 369 .	*R.*	 325
Wells, *In re* Sir Thomas Spencer .	[1933] Ch. 29 .	*R.*	 326
Westby's Settlement, *In re* . .	[1950] Ch. 296 .		 676
Williams Ld.'s Application, *In re* .	34 R.P.C. 197 .		 213
Williams' Settlement, *In re* . .	[1929] 2 Ch. 361 .	*F.*	. . 295, 298, 299

Williams' Trustees *v.* Inland Revenue Commissioners	[1947] A.C. 447	*R.*	272
Wilson, *In re*	[1913] 1 Ch. 314, 354	*R.*	273, 353
Wilson *v.* Kelland	[1910] 2 Ch. 306		556
Wohlgemuth's Will Trusts, *In re*	[1949] 1 Ch. 12	*Appl.*	1, 2, 13, 14
Wood *v.* Wood	L.R. 9 Ex. 190	*R.*	514
Woodward Ld. *v.* Boulton Macro Ld.	32 R.P.C. 173		215
Woolwich Equitable Building Society *v.* Marshall	[1952] Ch. 1	*C.*	554, 557, 558, 562, 565
Yorkshire Miners' Association *v.* Howden	[1905] A.C. 256	*R.*	488A
Young *v.* Bristol Aeroplane Co. Ld.	[1944] K.B. 718	*R.*	490, 499
Young *v.* Bristol Aeroplane Co. Ld.	[1944] K.B. 718	*Appl.*	616, 631, 636, 652
Young *v.* Ladies' Imperial Club	[1920] 2 K.B. 523, 528	*R.*	512

STATUTES JUDICIALLY CONSIDERED

1882

Married Women's Property Act, 1882 (45 *&* 46 *Vict. c.* 75), *s.* 17 - **Harman J. 274**

1886

Guardianship of Infants Act, 1886 (49 *&* 50 *Vict. c.* 27), *s.* 5 - - **C.A. 98**

1889

Interpretation Act, 1889 (52 *&* 53 *Vict. c.* 63), *s.* 1 - - - **Danckwerts J. 283**

1894

Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 22 (1) (*f*) - - - **Upjohn J. 364**

1914

Criminal Justice Administration Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 58), *s.* 30 (3) - **C.A. 98**

1918

Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 37 (1) - - - - **C.A. 672**
Sch. E, *rr.* 1, 5 - **Roxburgh J. 744**

1922

Finance Act, 1922 (12 *&* 13 *Geo.* 5, *c.* 17), *s.* 21 (1) - - - - **C.A. 615**

1925

Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *s.* 46 (1). **Wynn-Parry J. 525**

Guardianship of Infants Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 45), *s.* 3 (4) - - **C.A. 98**

Law of Property Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *ss.* 7 (1), 205 (1) (*v*) (*ix*). **Danckwerts J. and C.A. 383**

—— —— *s.* 82 (1) - - - **C.A. 479**

Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *s.* 30 (3) - - **Roxburgh J. 291**

—— —— *ss.* 73 (1) (iv), 84, 87. **Vaisey J. 24**

Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *ss.* 32, 33, 69 - - - **Upjohn J. 202**

—— —— *ss.* 64, 68 (5) - **Roxburgh J. 291**

1926

Adoption of Children Act, 1926 (16 *&* 17 *Geo.* 5, *c.* 29), *s.* 5 (2) (4) - **Upjohn J. 1**

1927

Finance Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 10), *s.* 31 (1) (4) - - - **C.A. 615**

1929

Local Government Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 17), *s.* 29. **Danckwerts J. and C.A. 383**

1936

Public Health Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 49), *s.* 31 - - **Upjohn J. 450**

—— —— *s.* 206 (1) (3). **Lloyd-Jacob J. 659**

Tithe Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 43), *ss.* 10, 17 (1) (3). **Danckwerts J. and C.A. 383**

1938

Trade Marks Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 22), *ss.* 2, 7, 8, 22 - - - **C.A. 50**

—— —— *ss.* 9, 11 (1), 15, 32 (1). **Lloyd-Jacob J. 210**

1939

Trading with the Enemy Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 89), *ss.* 7, 16 - **C.A. 50**

1940

Finance Act, 1940 (3 *&* 4 *Geo.* 6, *c.* 29), *s.* 43. **Upjohn J. 364**

—— —— *s.* 43 (1) - - **Dankwerts J. 567**

1946

Coal Industry Nationalization Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 59), *s.* 25 - **C.A. 169**

National Health Service Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 81), *ss.* 6 (1), 79 - **C.A. 530**

1947

Emergency Laws (Miscellaneous Provisions) Act, 1947 (11 *&* 12 *Geo.* 6, *c.* 10), *Sch.* 2, *para.* 6 - - - **C.A. 98**

Finance Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 35), *s.* 36 (1) *proviso* - - **C.A. 117**

1948

Agricultural Holdings Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *s.* 24 (1) (2) (*g*). **Danckwerts J. 283**

—— —— *ss.* 81 (1), *Sch. III*, *para.* 23. **Vaisey J. 24**

Children Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 43), *s.* 53 - - - - - **C.A. 98**

Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *ss.* 66, 67 - - - - **C.A. 169**

—— —— *ss.* 270 (1), 307 (1). **Wynn-Parry J. 225**

—— —— *s.* 302 - - - - **C.A. 131**

—— —— *ss.* 319, 353, 354, 399 (5) (*a*), 400. **Wynn-Parry J. 315**

1949

Distribution of German Enemy Property Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 85). **C.A. 50**

1950

Adoption Act, 1950 (14 *Geo.* 6, *c.* 26), *ss.* 13, 14, *Sch. V*, *s.* 4 - **Upjohn J. 1**

—— —— *s.* 13 (1) (4) - - **Vaisey J. 733**

Finance Act, 1950 (14 *Geo.* 6, *c.* 15), *s.* 44 (1), (3), (4) - - **Danckwerts J. 567**

1951

Guardianship and Maintenance of Infants Act, 1951 (14 *&* 15 *Geo.* 6, *c.* 56), *s.* 1. **C.A. 98**

1952

Magistrates' Courts Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55), *s.* 132, *Sch.* 6. **C.A. 98**

STATUTORY RULES, ORDERS AND INSTRUMENTS JUDICIALLY CONSIDERED

Distribution of German Enemy Property (No. 1) Order, 1950 (*S.I.* 1950, *No.* 1642), *para.* 18 (1) (3) - **C.A. 50**

Trading with the Enemy (Custodian) Order, 1939 (*S.R. & O.* 1939, *No.* 1198). **C.A. 50**

CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL

In re GILPIN. HUTCHINSON *v.* GILPIN.

1953
Oct. 13, 14.

Upjohn J.

[1952 G. 2231.]

Will—Construction—"Child"—Adoption—Whether adopted child to benefit—Adopter unable to bear children—Intention—"Disposition"—Whether "disposition" made at date of will or at date of death of testator—Adoption of Children Act, 1926 (16 *&* 17 *Geo.* 5, *c.* 29), *s.* 5 (2) (4)*—Adoption Act,* 1950 (14 *Geo.* 6, *c.* 26), *ss.* 13, 14, *Sch. V, s.* 4.

A testator, by his will dated September 3, 1947, gave his son and four named daughters shares in his residuary estate and settled the share of each on his or her issue as they should appoint and in default of appointment for the children who attained twenty-one years. One of the daughters was unable to bear children, and this fact was known to the testator. She and her husband had adopted in 1941, under the provisions of the Adoption of Children Act, 1926, a son whom the testator recognized as his grandson. The testator died on October 11, 1950, after the date of the coming into operation of the Adoption Act, 1950, on October 1, 1950.

That Act provided by section 13 (2) that in any "disposition" of property made after an adoption order whether inter vivos or by will, any reference to the "child" of the adopter should, unless the contrary intention appeared, be construed as referring to the adopted person. By section 4 of Sch. V, the provisions of section 13 were made applicable to adoption orders made under the Act of 1926, subject to a proviso that nothing therein "shall affect . . . "any disposition" made before January 1, 1950. Under the Act of 1926 it was provided that the expressions "child" or "children" where used in any disposition should not "unless the contrary "intention appears, include an adopted child or children."

The adopted son took out a summons to ascertain whether he was a "child" of the daughter within the meaning of the will, and as such entitled to share in the residue:—

Held, (1) that the word "disposition" in the proviso to section 4 of Sch. V meant, in the case of a will, the written document and not the benefit conferred by that document; so that the effective date to be considered was that of the making of the will and not that of the death of the testator, with the result that the adopted son took no benefit under the Act of 1950; but (2) that, on the true construction of the will, in view of the circumstances known to the testator, the testator had intended to make provision for the adopted son, so that he was a "child" of the daughter within the meaning of the will.

Berkeley v. *Berkeley* [1946] A.C. 555; 62 T.L.R. 478; [1946] 2 All E.R. 154 considered.

Hill v. *Crook* (1873) L.R. 6 H.L. 265; *In re Eve* [1909] 1 Ch. 796; *In re Wohlgemuth's Will Trusts* [1949] Ch. 12; 64 T.L.R. 587; [1948] 2 All E.R. 882 and *In re Fletcher* [1949] Ch. 473; [1949] 1 All E.R. 732 applied.

ADJOURNED SUMMONS.

By his will, dated September 3, 1947, George Gilpin bequeathed to his son and to each of his four daughters Dorothy Kate Wright, Margery Annie Hutchinson, Phyllis Moss and Kathleen Mary Bailey £1,000 free of legacy duty. By clause 8 the testator devised, bequeathed and appointed his residue to his trustees on trust for sale and conversion, and payment of his debts, funeral and testamentary expenses and he directed them to "stand possessed of the residue thereof in trust for my son "and my said four daughters in equal shares provided always "and I declare that my trustees shall retain the share of my "son and each of my said daughters of and in my residuary "estate upon the trusts following (that is to say) upon trust "to pay the income thereof to my said son and daughters during "their lifetime but so that they shall not have power to dispose "of same by way of anticipation and from and after the death "of such son or daughters in trust for the children of my same "son or daughters or any of them or any of their issue in such "shares (if more than one) and in such manner as they and each "of them shall by deed or will appoint and in default of such "appointment and so far as any such appointment shall not "extend in trust for the children of my same son and daughters "who being male shall attain the age of twenty-five years and "being female attain that age or marry in equal shares and if "there shall be only one such child the whole to be in trust "for that one child and in case there shall be no child of my "same son or daughters then and in such case in trust for my "other children in equal shares and so that the share or shares "accruing to each or any my said son or daughters of mine "under this trust shall be subject to the trusts hereby declared "concerning the original share of the same son or daughters "under this my will." Then followed this proviso: "Provided "always and I hereby declare that if any child of mine shall "die in my lifetime leaving a child or children who being a male "shall attain the age of twenty-five years or being a female shall "attain that age or marry then and in every such case the last "mentioned child or children shall take and if more than one "equally between them the share of capital in my residuary "estate to which his her or their parent would have been entitled "to the income thereof under this my will if such parent had "survived me including any share or shares which would have "accrued to such parent under the trusts and provisions in that "behalf hereinbefore contained." By clause 9: "I declare that "my trustees shall have power to raise any part or parts not "exceeding together one moiety of the vested or expectant share "of any grandchild of mine under the trusts of this my will and "apply the same for his or her advancement preferment and "benefit as my trustees shall think fit."

The testator's daughter Margery Annie Hutchinson had no children (having, at the age of eighteen had, with the knowledge of the testator, an operation, as a result of which she would be unable to bear children), but she and her husband had one adopted son whom they were authorized to adopt by an order of February 12, 1941, under the Adoption of Children Act, 1926,[1] under which rights of succession were unaltered.

---

[1] Adoption of Children Act, 1926, s. 5 (2): "An adoption order shall "not deprive the adopted child of any "right to or interest in property to "which, but for the order, the child "would have been entitled under any "intestacy or disposition, whether "occurring or made before or after "the making of the adoption order, "or confer on the adopted child any "right to or interest in property as "a child of the adopter, and the "expressions 'child,' 'children' and "'issue' where used in any disposi- "tion whether made before or after "the making of an adoption order, "shall not, unless the contrary inten- "tion appears, include an adopted "child or children or the issue of an "adopted child. . . . (4) For the "purposes of this section 'disposi- "'tion' means an assurance of any "interest in property by any instru- "ment whether inter vivos or by will "including codicil."

Adoption Act, 1950, s. 13 (1): "Where, at any time after the making "of an adoption order, the adopter "or the adopted person or any other "person dies intestate in respect of "any real or personal property (other "than property subject to an entailed "interest under a disposition made "before the date of the adoption "order), that property shall devolve "in all respects as if the adopted

1953

GILPIN, *In re.* HUTCHINSON *v.* GILPIN.

On October 1, 1950, the Adoption Act, 1950,[1] came into force, and by that Act the law relating to the benefits which adopted children might receive from their adopted parents were radically altered.

The testator died on October 11, 1950, and the question arose whether the bequest was an effective disposition made after the date of the will but before the Adoption Act, 1950, came into force, or a disposition which came into operation at the date of the testator's death.

The adopted son, therefore, took out a summons to determine whether, on the true construction of clause 8 of the will and of section 13 and section 4 of Sch. V to the Adoption Act, 1950, he was a "child" of Margery Annie Hutchinson within the meaning of that clause and entitled as such to share in the residuary estate of the testator.

"person were the child of the adopter born in lawful wedlock and were not the child of any other person. (2) In any disposition of real or personal property made, whether by instrument inter vivos or by will (including codicil), after the date of an adoption order—(*a*) any reference (whether express or implied) to the child or children of the adopter shall, unless the contrary intention appears, be construed as, or as including, a reference to the adopted person; (*b*) any reference (whether express or implied) to the child or children of the adopted person's natural parents or either of them shall, unless the contrary intention appears, be construed as not being, or as not including, a reference to the adopted person; and (*c*) any reference (whether express or implied) to a person related to the adopted person in any degree shall, unless the contrary intention appears, be construed as a reference to the person who would be related to him in that degree if he were the child of the adopter born in lawful wedlock and were not the child of any other person."

S. 14 (1): "For the purposes of the application of the Administration of Estates Act, 1925, to the devolution of any property in accordance with the provisions of the last foregoing section, and for the purposes of the construction of any such disposition as is mentioned in that section, an adopted person shall be deemed to be related to any other person being the child or adopted child of the adopter or (in the case of a joint adoption) of either of the adopters—(*a*) where he or she was adopted by two spouses jointly, and that other person is the child or adopted child of both of them, as brother or sister of the whole blood; (*b*) in any other case, as brother or sister of the half-blood. (2) Notwithstanding any rule of law, a disposition made by will or codicil executed before the date of an adoption order shall not be treated for the purposes of the last foregoing section as made after that date by reason only that the will or codicil is confirmed by a codicil executed after that date. . . . (4) Where an adoption order is made in respect of a person who has been previously adopted, the previous adoption shall be disregarded for the purposes of the last foregoing section in relation to the devolution of any property on the death of a person dying intestate after the date of the subsequent adoption order and in relation to any disposition of property made after that date."

R. S. Lazarus for the plaintiff. The plaintiff is the adopted son of one of the four daughters of the testator, all of whom are named in the will. The question is whether he is a " child " of that daughter for the purposes of the will. The date of the will was earlier than that of the coming into operation of the Adoption Act, 1950, but the death occurred after that Act came into force. The question is whether the interest bequeathed to the child was a disposition made at the date of the will or only effective at the date of the death of the testator. If the former, the adopted son would be excluded, but if the disposition was made at the date of the death the child would, having regard to the operation of the Act of 1950, be entitled to an interest.

The word " disposition " is not capable of any double meaning. It implies the actual result of what was done. It is, therefore, not the date of the document, but the date of the coming into operation of the bequest, i.e., the date of the death of the testator, which is the effective date. The adopted son is, therefore, entitled to benefit under the provisions of the Act of 1950: see *Berkeley* v. *Berkeley* [2] and the observations of Viscount Simon in his speech, where the word " provision " was under consideration.

On the construction of the will and on the evidence it is clear that the words " child or children " in the clause include the adopted child, as no contrary intention appears. [Reference was made to *Hill* v. *Crook* [3]; *In re Eve* [4]; *In re Wohlgemuth* [5]; and *In re Fletcher.* [6]]

Mark Nesbitt for the defendants. There are four points for consideration: (1) The application of the Act of 1950, and in particular of section 13, is excluded by the proviso to paragraph 4 of Sch. V; (2) a will is made at the date of its execution: *Berkeley* v. *Berkeley* [7]; (3) on the construction of the present will the words " child or children " are confined to legitimate children; (4) if the Act of 1950 does apply, then a contrary intention is to be found in clause 9 of the will.

As regards (1), " disposition " refers to words contained in the document and not the document itself: see Adoption of Children Act, 1926, s. 5 (4). In that Act " disposition " means documents or assurances and not benefit; it also bears that meaning in sections 9 and 10 of the Adoption of Children Act,

---

[2] [1946] A.C. 555, 566; 62 T.L.R. 478; [1946] 2 All E.R. 154.

[3] (1873) L.R. 6 H.L. 265.

[4] [1909] 1 Ch. 796.

[5] [1949] Ch. 12; 64 T.L.R. 587; [1948] 2 All E.R. 882.

[6] [1949] Ch. 478; [1949] 1 All E.R. 732.

[7] [1946] A.C. 555.

1949. As regards section 13 (2) of the Act of 1950, the words "in any disposition" must mean "in any document," because it would make nonsense to say that they meant "in any benefit." "In any disposition" must mean "under any disposition." As to the use of the word "disposition," see also section 3 of the Legitimacy Act, 1926.

As regards (2), the word "children" in this will is confined to legitimate children. The testator did not intend each phrase to apply to every share indiscriminately. The daughter, Mrs. Hutchinson, had no child and the court ought not to infer that the testator meant an adopted child. [*Hill* v. *Crook*[8] was referred to.].

When the phraseology of section 13 of the Adoption Act, 1950, is considered, it is clear that the draftsman regarded a "disposition" as being not the benefit itself, but that which gave rise to the benefit. Consequently the disposition is referable to the date of the document and not to the date of the testator's death, when it came into effect. That being the case, the material date was earlier than that on which the Adoption Act, 1950, came into force, and the adopted child cannot benefit under the legislation as altered by that Act and does not take a share in the estate. [Reference was made to *In re Eve.*[9]]

Lazarus in reply. As to the meaning of "disposition," see section 5 (4) of the Adoption of Children Act, 1926. Its use is also explained in section 205 (1) (ii) of the Law of Property Act, 1925. See also that part of the statute dealing with "dispositions "on trust for sale" (section 23, etc.).

UPJOHN J. This summons raises an interesting question on the construction of the will of the testator, George Gilpin, and as to the true interpretation of the Adoption Act, 1950. At this stage of my judgment it will be sufficient to say that the plaintiff is the adopted son of one Margery Annie Hutchinson and her husband, Mrs. Hutchinson being a daughter of the testator. The adoption order was made by the Leeds County Court on February 12, 1941, under the powers conferred by the Adoption of Children Act, 1926.

[His Lordship read section 5 of the Act of 1926 and continued:] The testator made his will on September 3, 1947, and it again will be sufficient at this stage for me to say that in that will he made a provision for his five children, one of them being Mrs. Hutchinson,

[8] L.R. 6 H.L. 265.

[9] [1909] 1 Ch. 796.

and, having given each of his children shares in his residuary estate, he settled each child's share on his or her issue as they should appoint and, in default of appointment, for the children who attained 21 years, reading it subject to the Law of Property Act, with gifts over to other shares if no child of any particular child took. It follows from that that, apart from certain other facts which I shall have to mention at a later stage, having regard to the provisions in section 5 of the Adoption of Children Act, 1926, the plaintiff would not take any part of the property under the disposition in the will of the testator unless he can satisfy the court that a contrary intention appears. The Act of 1926, however, was replaced by the Adoption of Children Act, 1949, which came into force on January 1, 1950. That Act in turn, however, was replaced and repealed by the Adoption Act, 1950, which came into force on October 1, 1950, and I do not think I need refer to any provision in the Act of 1949.

The Act of 1950 radically altered the policy of the law in relation to the benefits which adopted children might receive from their adopting parent. [His Lordship read section 13 (1), (2) and (3) and section 14 (1), (2) and (4) of that Act and continued:] Therefore, in cases where an adoption order is made under the Adoption Act, 1950, the rights of the adopted child are radically altered, because unless in any instrument, whatever that may be, the contrary appears, putting it shortly, he or she is for all purposes of devolution to be treated as the child of the adopter born in lawful wedlock.

The order in Leeds County Court was made, of course, under the Act of 1926, and to such an order the transitional provisions of the Adoption Act, 1950, are applicable. The relevant provision is to be found in section 4 of Sch. V, and it is in these terms: "Sections 13 to 15 of this Act shall apply in relation to an "adoption order made under the Adoption of Children Act, 1926, "or the Adoption of Children (Scotland) Act, 1930, or made "before the commencement of this Act under the Adoption of "Children Act (Northern Ireland), 1929, as if it were an adoption "order within the meaning of those sections respectively." Now follow the important words: "Provided that nothing in section 13 "of this Act shall affect the devolution of any property on the "intestacy of a person who died before the first day of January, "1950, or any disposition made before that date." To complete the facts at this stage, the testator died on October 11, 1950, and his will was duly proved by the first three defendants on March 17, 1951.

1953

GILPIN,
In re.
HUTCHINSON
v.
GILPIN.

Upjohn J.

Now, the first point I have to consider is this: If, for the purposes of the proviso to the fourth section of Sch. V which I have just read, a disposition means a will, then the disposition was made at the date of the will—that is, in 1947—and section 13 of the Act of 1950 does not affect it. If, on the other hand, the disposition must be taken to be, as it is submitted by the plaintiff, an effective disposition, that is one which came into force on the death of the testator, because his will then became an effective instrument, then the relevant date would be October 11, 1950, and, unless a contrary intention appears, section 13 of the Act of 1950 would apply and the plaintiff would be, for the purposes of devolution under the will of the testator, a child of his adopting parent, Mrs. Hutchinson.

Mr. Lazarus for the plaintiff has submitted that the disposition means an effective disposition. A will, he submits, is purely ambulatory in its operation and, until the death of the testator, can affect no rights and no interests; it remains revocable, provided the testator remains of sound mind, memory and understanding, up to the very moment of his death; and therefore it would not be right to consider such a document as a disposition. The disposition to which the Act is pointing is, he submits, the effective disposition made by the death of the testator and the coming into operation of his will.

Mr. Lazarus pressed me with a decision of the House of Lords in *Berkeley* v. *Berkeley*.[1] That was a decision on the Finance Act, 1941, which provided: "Subject to the provisions "of this section, any provision, however worded, for the payment ". . . of a stated amount free of income tax . . . being a "provision which (*a*) is contained in any deed or other instrument, in any will or codicil, in any order of any court, in any "local or personal Act, or in any contract . . . and (*b*) was made "before September 3, 1939; and (*c*) has not been varied on or "after that date, shall, as respects payments falling to be made "during any year of assessment, the standard rate of income "tax for which is ten shillings in the pound, have effect as if for "the stated amount there were substituted an amount equal to "twenty twenty-ninths thereof." The whole question there was whether the provision meant the benefit conferred by the document or whether it meant the document itself. Four of their Lordships came to the conclusion, after a close analysis of the words of the section, that it had the former meaning, Lord

---

[1] [1946] A.C. 555; 62 T.L.R. 478; [1946] 2 All E.R. 154.

Porter dissenting on that point, but agreeing with the order made by the House on other grounds.

The problem which their Lordships had to consider was succinctly stated by Lord Simon [2] in these terms: " The crucial " question is what is the meaning of the phrase ' any provision, " ' however worded.' It may mean, as the Court of Appeal " thought, the words which define a benefit and which are " contained in the document or oral contract referred to in the " section. Or it may mean the benefit conferred by such a " document or oral contract. If it bears the first of these meanings, it is to be found in the language of the document or oral " contract and is necessarily of the same date, being in effect " equivalent to a clause. If it means the second, its date will " be the date when the benefit is conferred." Then his Lordship went on to discuss the reasons which led him to come to the conclusion that the correct construction was the second meaning which he had mentioned.

Now, the word I have to consider is not " provision," but " disposition," and I find that word in quite a different context to the context which their Lordships had to consider in *Berkeley* v. *Berkeley*.[3] I do not myself for the purposes of this case derive great assistance from the observations which they made in relation to the words they had to consider, and I do not think that I need quote further from that case. As I have said, the word here is " disposition " and, although it may be that a disposition can refer to the benefit conferred by an instrument, it seems to me that the more normal meaning would be to use the word " disposition " in reference to a document and not to the effect of that document. As was put to me by Mr. Nesbitt in argument, most wills start with this well-known clause: " I " revoke all testamentary dispositions heretofore made by me." Therefore, I approach this problem with the view that the word " disposition " is more apt to mean a document and, therefore, in reference to the making of a disposition, to bear the date of the document rather than to be defined by the date on which it comes into operation. However, I do not, of course, decide this case on any such broad ground, because, in my judgment, when sections 13 and 14 of the Adoption Act, 1950, are regarded and analysed closely, there is ample ground for thinking that the draftsman must have intended, when using the word " disposition," to refer to the document which created the right, rather than the event when the benefit came into effect.

---

[2] [1946] A.C. 555, 565.

[3] Ibid. 555.

Now, Mr. Nesbitt pointed out that the meaning sought to be put on the word " disposition " by Mr. Lazarus is inconsistent with the phraseology in section 13 (1), particularly the words within the brackets, " other than property subject to an entailed " interest under a disposition made before the date of the adop- " tion order." There is a clear distinction there between property or benefit and the disposition which gives rise to the benefit. The words, he submitted, in subsection (2) are even stronger, because they open with this phrase, " In any disposition of real or per- " sonal property made, whether by instrument inter vivos or by " will " those words again showing that the reference was being made to a document. It goes on: " any reference (whether " express or implied) to the child or children of the adopter shall, " unless a contrary intention appears, be construed as . . . a " reference to the adopted person." That phraseology is repeated in subparagraphs (*b*) and (*c*). Therefore, when the subsection is talking of a reference and the construction of a reference in a disposition, one is almost necessarily driven to the view that the disposition means the document rather than the operation of the document.

The same general comments can be made on section 14 (1), because it refers to the purposes of the construction of any such disposition, which again is only apt when a particular document is being considered. But what, to my mind, is conclusive on this matter is section 14 (2), because, if the construction sought for by Mr. Lazarus is right, that subsection is wholly useless and can have no operation whatever, as it refers to a will or codicil being confirmed by a codicil executed after the date of an adoption order. If the relevant date be the death of the testator, that section can have no conceivable operation.

For these reasons, therefore, I come to the conclusion that in the fourth paragraph of Sch. V a " disposition made before " that date " is, for the purposes before me and when considering a disposition by will, referring to the date of the will and not to the date when the provisions of the will became effective by the death of the testator. I do not, of course, in this case have to consider the question of any codicil. Accordingly, in my judgment, the disposition was a will which was made in 1947, so that sections 13 to 15 of the Adoption Act, 1950, do not affect the devolution of any property under it.

That, however, does not conclude the matter against the plaintiff, because Mr. Lazarus's second main point is this: He says, either by the operation of the general law or by the operation of the Act of 1926, which (though repealed by the Act of 1950) is kept in force as regards acts done under it by the Interpretation Act, 1889, s. 38 (2) (*b*), a contrary intention appears. His broad submission is this, that on the true construction of the will, the words "child or children" must necessarily include the adopted child, the plaintiff.

I must refer now in detail to the will. In paragraph 5 the testator says: "I bequeath to my son the said George Wightman "Gilpin and to each of my four daughters Dorothy Kate Wright "the said Margery Annie Hutchinson"—that is the plaintiff's adopting parent—"the said Phyllis Moss and Kathleen Mary "Bailey the sum of one thousand pounds free from legacy duty." [His Lordship then read clauses 8 and 9 of the will and continued:]

Mr. Nesbitt, for the trustees and for Mrs. Bailey, has directed some forcible remarks to the grammar in the residuary gift that I have read. He points out that it is a collective gift and it is not necessary to suppose that the testator intended it to become effective in relation to the issue of all his children. I think the will is open to some grammatical criticism, but I cannot for myself feel the slightest doubt as to what the testator was effecting in clause 8 of his will. He gave nominatim to each child a fifth share of his residue. That share was settled on each for life and, on his or her death, that share was to go amongst the issue of that child as that child should appoint; if the child did not appoint, then it was to go to the children who attained, as corrected by the Law of Property Act, 21 years, equally; and if there were no such children, that particular share was to go over to the other shares and was to be held on the same trusts as those other shares. I do not think there can be any doubt that that is the true construction of that will. In the circumstances which I must now mention, Mr. Lazarus invokes a principle of construction to bring in the adopted child.

Now, the events on which he relies are these, that Mrs. Hutchinson, who was born in 1899, had the misfortune to undergo, at the age of 18, an operation which meant that she could never bear children. The effect of that operation was, it is quite clear from the evidence, known to her father, the testator, and known to the members of her immediate family. Later on she married her husband, and in 1941 she and her husband jointly adopted the plaintiff. The plaintiff in fact was the lawful nephew of the husband, and he was at the time of the adoption some 12 years of age. Ever since that time, the plaintiff has lived with his adopted parents, at any rate during his infancy, but he called them " uncle " and " aunt." The reason for that is readily understood, because, being of the age of 12, he already knew of them as " uncle " and " aunt," and they did not want to change that. They thought it might only mystify a boy of 12, and so he continued to call them " uncle " and " aunt." The adoption was made with the full approval of the testator, who, as I understand it, encouraged them in that course; and the evidence, although perhaps it is not as voluminous as might be desired, amounts to this; that the testator recognized the adopted child as his grandson, the adopted child called the testator " grandpa," and he was recognized generally as such.

Those being the circumstances, says Mr. Lazarus, the testator must necessarily, when making a gift to the children of Mrs. Hutchinson, have intended to benefit the plaintiff, because when he made his will the testator well knew that his daughter never could have any natural legitimate children.

The principle on which he relies is the well-known principle which was laid down by Lord Cairns in *Hill* v. *Crook*.[4] That passage was quoted in *In re Eve*,[5] a case in which the testator gave a gift equally among " the children of my sisters Mary Ann " Burns " and others " and the issue of such of them as shall " die in my lifetime leaving issue." Mary Ann Burns was, at the date of the will, a widow nearly 68 years of age. She had been married in 1869, having had two children by her husband before marriage, and had no other children. She was living with E. at the date of her will and her death. E. knew all the facts and was on affectionate terms with the children; and the other sisters and brothers had legitimate children living. It was held " that M. A. " Burns' two illegitimate children took shares on the ground that " there were not, and never could be, any legitimate children " to answer the description."

Swinfen Eady J. said this[6]: " I propose merely to state the " law as laid down by the highest authority and apply it to this " case. The term ' children ' in a will prima facie means legiti- " mate children, and if there is nothing else, the circumstance " that the person whose children are referred to has illegitimate " children will not entitle those illegitimate children to take. " Then Lord Cairns said in *Hill* v. *Crook*[7]: ' But there are

---

[4] (1873) L.R. 6 H.L. 265, 282.

[5] [1909] 1 Ch. 796.

[6] Ibid. 799.

[7] L.R. 6 H.L. 265.

" ' two classes of cases in which that prima facie interpretation is " ' departed from. One class of cases is where it is impossible " ' from the circumstances of the parties that any legitimate " ' children could take under the bequest. A familiar example " ' of that might be given in this way:—Suppose there is a " ' bequest " to the children of my daughter Jane," Jane being " ' dead, and having left illegitimate children, but having left no " ' legitimate children. There, inasmuch as the testator must be " ' taken to have known the state of his family, and must be taken " ' to have intended to benefit some children of his daughter " ' Jane, and inasmuch as she had no children who could be " ' benefited except illegitimate children, rather than that the " ' bequest should fail altogether the courts will hold that those " ' illegitimate children are intended, and they will take under " ' the term " children." ' Applying that statement of the law " to this case, I have to ask myself who could the testatrix have " meant when she made this gift to the children of Mary Ann " Burns, the old widowed sister who was then living with her. " There were two illegitimate children whom she knew all about, " and there never could be any other or legitimate children " who could take under this bequest. Lord Cairns said that one " class of cases in which illegitimate children may take is, where " there is a gift to children and it is impossible that legitimate " children should take. That is this case. In the circumstances " which existed at the date of the will it was impossible that any " legitimate children should take. There were none and never " could be any. It is impossible to come to any other conclusion " than that the testatrix intended these two children to take, and " I must give effect to that intention—an intention which I arrive " at not from any conjecture as to what the testatrix meant, but " from the will itself with the assistance of such surrounding " circumstances as I am bound to look at. I therefore decide that " the two illegitimate children of Mary Ann Burns are entitled to " shares in the residue."

Then in 1949 the principle was applied in two cases. The first was *In re Wohlgemuth, Public Trustee* v. *Wohlgemuth*,[8] a decision of Jenkins J., who applied the general principle of *Hill* v. *Crook*[7] to the case, a rather exceptional case, where it was proved that the testator himself was incapable of begetting further children. Jenkins J. came to the conclusion that in his will the testator must have intended to benefit two earlier illegitimate children. He said this[9]: "In the unusual and peculiar circum-"stances of this case, and on the evidence, I find that it is "proved that at the date of his will the testator was permanently "incapable of having any further children by his wife or, indeed, "by any other woman, and furthermore that he was well aware "at that date that he was so incapable. One may add also that, "rightly or wrongly, he believed that in any case there was no "longer any possibility of his wife having a child, irrespective "of his own capacity. That being so, in my judgment the case "is brought within the first of the two exceptions to the general "rule as stated by Lord Cairns and applied by Swinfen Eady J. "in *In re Eve*,[10] and accordingly the material parts of this will "must be construed as making provision for the two children of "the testator and the first defendant, notwithstanding that they "were not legitimate children."

---

[8] [1949] Ch. 12; 64 T.L.R. 587; [1948] 2 All E.R. 882.

In the same volume of the reports, Roxburgh J. in *In re Fletcher*,[11] extended the principle to adopted children. The case (which was not unlike the present case, although there were many other circumstances in that case which are not present here) was that the testator's daughter was incapable herself of bearing a child and she adopted a child, and the judge came to the conclusion that the testator, in making a gift to the children of that daughter, must have intended to benefit the adopted child. He said this[12]: "There is no doubt (and I start with this "as a fundamental proposition) that 'children' in an English "will prima facie means legitimate children and prima facie does "not include either illegitimate or adopted children. That being "so, Mr. Pascoe Hayward for the adopted children, has adum-"brated three arguments." I can now proceed to the third argument, which the judge dealt with as follows[13]: "To do that, "I must refer to the law relating to illegitimate children, though "this case concerns not illegitimate but adopted children; and I "must refer to the case of illegitimate children because several "decisions have been given with regard to illegitimate children, "but none hitherto, as far as I am aware, with regard to adopted "children." Then he cited the passage from Lord Cairns' speech in *Hill* v. *Crook*,[14] and continued: "Mr. Berkeley has "submitted that I ought not to apply to an adopted child the "principles which are applicable to an illegitimate child, on the "ground that an illegitimate child is at least a natural child of

---

[9] [1949] Ch. 20; [1949] 1 All E.R. 732.
[10] [1909] 1 Ch. 796.
[11] [1949] Ch. 473.
[12] Ibid. 479.
[13] Ibid. 480.
[14] L.R. 6 H.L. 265.

1953

GILPIN,
In re.
HUTCHINSON
v.
GILPIN.

Upjohn J.

"the person named, whereas an adopted child has no status as "a child, except such, if any, as is conferred on it by the adoption order. I am disinclined to draw such a distinction. I "think that the question in every case is: In what sense has the "testator used the word 'children'? Prima facie he has used "it in its natural sense, as meaning lawful children; but, if once "I ought to come to the conclusion that he has not used it in its "natural sense of lawful children, it seems to me that it must "be legitimate to inquire into the sense in which he has used the "word and that it makes no difference in principle whether I "find that he has used it in the sense of illegitimate children "or that he has used it in the sense of adopted children. It is "common for people to speak of both illegitimate children and "adopted children as 'children' simpliciter."

Applying the principle illustrated by those cases to this case, I cannot accept Mr. Nesbitt's argument that, because the residuary gift is a collective gift, it was not intended to take effect in favour of each child, but it is sufficient if the words are satisfied in the case of the children who have legitimate children. That submission seems to me to be contrary to principle and certainly contrary to *In re Eve.*[15] It seems to me clear that the testator intended to give one fifth share to his daughter for life and then to benefit her children. In 1947 he knew that she could have no natural lawful children. He knew and approved of the fact that she had an adopted child. I venture to think that the case is a clear one, and that the testator must have intended in this case to include the plaintiff in his testamentary disposition.

It was argued by Mr. Nesbitt that the reference to the word "parent" in the proviso at the end of clause 9 and the reference to "any grandchild of mine" in clause 9 was an indication that the testator intended to benefit only his lawful natural grandchildren. I do not take that view. Once it is established, as I think it is, that the testator intended to benefit an adopted child by including such a child amongst the description of "child "or children" in the early part of clause 8, I see no difficulty in assuming that, when he used the word "parent," he intended to include adoptive parent, and when in clause 9 he used the word "grandchild" he meant to include grandchildren by adoption of the daughter.

Accordingly, I shall declare "that, on the true construction "of clause 8 of the will of the above-mentioned testator dated

---

[15] [1909] 1 Ch. 796.

1953

GILPIN,
In re.
HUTCHINSON
v.
GILPIN.

Upjohn J.

"September 3, 1947, the plaintiff, as the adopted child of "Margery Annie Hutchinson, one of the daughters of the "testator, is a 'child' of the said daughter within the meaning "of the said clause and entitled as such to share in the residuary "estate of the testator, and that he is also a 'grandchild' for the "purposes of clause 9 of the said will."

Declaration accordingly.

Solicitors: *Waterhouse & Co. for Ford and Warren, Leeds; Haslewood, Hare, Shirley Woolmer & Co. for Bateson (W.), Coates & Co., Leeds.*

J. L. D.

1953
June 25.

Vaisey J.

In re DARGIE, DECD.
MILLER *v.* THORNTON-JONES AND OTHERS.

[1951 D. 271.]

Costs—Solicitor and client—Hostile litigation between trustees and beneficiaries—Whether trustees entitled to costs on basis of an indemnity.

In an action brought by beneficiaries under a will to assert a personal pecuniary claim against the trustees, it was ordered that the costs of the defendant trustees be taxed as between solicitor and client and that those costs when taxed "be retained and paid "by the defendants in the action as trustees of the . . . will "out of the estate of the . . . testator."

Certain disbursements, including a portion of counsels' fees, amounting to £437 were disallowed on taxation.

The present summons was taken out to ascertain whether the trustees were entitled to pay and retain out of the residuary estate all or any part of the sum of £437 or ought to account for and refund to the residuary estate the whole or some part of this sum:—

Held, that the trustees were not entitled to retain the disallowed items amounting to £437, but that they ought to account and refund to the residuary estate the whole of the amount so paid and retained over and above the taxed costs.

Poole v. *Pass* (1839) 1 Beav. 600 distinguished.

In re Robertson, decd. [1949] 1 All E.R. 1042 applied.

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

ADJOURNED SUMMONS.

By his will dated April 5, 1940, Thomas Frederick Dargie, who died on April 8, 1942, appointed the defendants to be his executors and trustees. In 1950, the plaintiff on the present summons and other beneficiaries under the testator's will, brought a hostile action against the defendants, the trustees. In that action [1950 D. 670] the beneficiaries sought (a) to have accounts taken of the remuneration actually received by the defendants from payments made to them by a certain limited company in which the testator had held large interests, and repayment of what might be found due on the account for the benefit of the testator's estate; (b) certain other relief; and (c) that the defendants be ordered to pay the costs of the action.

The action was tried by Wynn-Parry J., who during the course of the hearing directed that an originating summons be issued to cover certain of the issues raised in the writ. Judgment was delivered on July 5, 1951, and there followed a full argument on the question of costs. At the end of the discussion Wynn-Parry J. said: "I have listened to counsel on the question of "costs, and if I make what might be called a strict order it "would be of the utmost complication and I think that it would "result in nothing but more expense. The view I take is that "part of the trouble has been caused by this action being started "by writ instead of being brought before the court on an originating summons. On the other hand, there are certain costs— "I do not know how much or what percentage they represent— "which have been incurred by the defendants which, in the "course the case took . . . need not have been incurred. On "the whole it appears to me that so far as the defendants are "concerned, they as trustees ought to have their costs as between "solicitor and client out of the estate. So far as the plaintiffs "are concerned, I think that, on the whole, as they are the "persons interested in income and contingently interested in "capital and it is extremely difficult to analyse their costs, the "best thing to do is to make a similar order as regards their "costs. So, in effect, I shall order the costs of all parties as "between solicitor and client to be taxed and paid out of the "estate." The order as finally drawn up provided: "And this "court doth order that it be referred to the taxing master to "tax as between solicitor and client the costs of the plaintiffs "and the defendants both of this action and of the said application by originating summons and it is ordered that all the said "costs when taxed be retained and paid by the defendants in

" the said action as the trustees of the said will out of the estate " of the said testator."

Certain disbursements, including a portion of counsel's fees, amounting to £437, were disallowed on taxation.

The plaintiff took out the present summons to ascertain whether, having regard to the order of Wynn-Parry J., dated July 5, 1951, the defendants as trustees of the testator's will (a) were entitled to pay and retain out of the residuary estate the sum of £437 the amount by which the sum of £2,523 paid or retained by the defendants in respect of the costs of the proceedings exceeded the sum of £2,086 at which the costs were taxed pursuant to the order or any and if so what part of the sum of £437; or (b) ought to account for and refund to the residuary estate the sum of £437 or any and if so what part thereof with interest from the date of payment or retention.

Lionel Edwards Q.C. and *W. A. Bagnall* for the plaintiff. The defendant trustees are not entitled to costs on an indemnity basis. This is plain from the order of Wynn-Parry J. which directed the costs of all parties to be taxed as between solicitor and client both of the action and the application by originating summons. The trustees would have a much stronger claim for costs on such a basis if in the litigation they had been joined as defendants merely as representing the trust estate. This, however, was not the case. The action was brought by the beneficiaries to assert a personal pecuniary claim against the trustees, and in those circumstances it cannot be right, unless the order of Wynn-Parry J. is plainly to the contrary, that the trustees are entitled under that order to reimburse themselves out of the trust capital in respect of such moneys as were disallowed on a solicitor and client taxation.

If trustees are entitled in any event to the whole of their costs and expenses of litigation on an indemnity basis, the court has been wasting the time of the parties and of its own officer—the taxing master—in ordering the taxation of trustees' costs, and has done so for generations. This argument reductio ad absurdum lends strong support to the proposition advanced by the plaintiff.

E. I. Goulding for the defendants. Having regard to the form of order and the reasons given by Wynn-Parry J., the order in this case was intended to give the trustees the same protection as a trustee who comes creditably out of an action brought by a beneficiary against him for breach of trust. In such a case, where a trustee is attacked for what he has done in the execution of the trust, he is entitled, in the absence of misconduct, to his costs and to the same indemnity as if he were defending the suit for the benefit of the estate: *Walters* v. *Woodbridge.*[1] A trustee, in general, is entitled to a full indemnity for all costs properly incurred, and if the modern form of order does not give him an indemnity, nevertheless, he is entitled to it under the general law.

The history of the taxation of a trustee's costs helps to elucidate this question. In the early days of courts of equity, at the end of the seventeenth century, a trustee was entitled to his "real costs": *Amand* v. *Bradbourne.*[2] In a case before Lord Eldon L.C. in 1804 it was held on a motion that the trustees' costs were to be taxed as between party and party but that they were entitled to retain their other charges and expenses under the head of "just allowances": *Fearns* v. *Young.*[3] Within the next half-century it became the practice for trustees' costs to be taxed as between "solicitor and client." This was satisfactory, for in the nineteenth century such an order for taxation meant what it said. It was the development of the principle recognized in *Giles* v. *Randall*[4] which introduced the question whether the taxation of trustees' costs on the basis of solicitor and client would afford them a full indemnity.

The question for decision, therefore, is whether it can be implied into the order of Wynn-Parry J. that the trustees may not retain out of the trust fund more than they have been allowed on taxation. It is submitted, for the reasons which have been advanced, that no such implication attaches to an order that trustees be paid their costs as between solicitor and client. [Reference was also made to Underhill's Law of Trusts and Trustees, 10th ed., pp. 494 and 497; *Poole* v. *Pass*[5]; *In re Dunn.*[6]]

Edwards Q.C., in reply, referred to *In re Robertson, decd.*[7]

VAISEY J. The question which arises in this case is whether the defendants were entitled to withdraw from the trust estate, and to retain as they have done, the sum of £437. It is put on this ground that the defendants, being trustees, are prima facie entitled to have their costs provided to such an extent and in such manner as to afford them a complete indemnity.

Several questions arise on that. First, did the judge, who tried the action, intend them to have a full indemnity for their costs? If this had been an action which was concerned solely with the benefits accruing, or intended to accrue, to the trust estate, in which the trustees had adopted a wholly disinterested and independent attitude, which is the normal attitude of trustees in such cases, I feel little doubt that Wynn-Parry J., if he had been asked, would, at any rate, have considered whether it was his intention to give the trustees full indemnity. But, on reading the passages in his judgment which are relevant on the point, I think that the order for the taxation of the defendants' costs—not on an indemnity basis—between solicitor and client, was something in the nature of a compromise, something in the nature of an adjustment, and perhaps rather a rule of thumb regulation of the position.

---

[1] (1878) 7 Ch.D. 504.
[2] (1682) 2 Chan.Cas. 87, 138.
[3] (1804) 10 Ves. 184.
[4] [1915] 1 K.B. 290.
[5] (1839) 1 Beav. 600.
[6] [1904] 1 Ch. 648.
[7] [1949] 1 All E.R. 1042.

I think that although this was an action which was to some extent for the benefit of the estate, it was still more an action which was concerned with the rights of the trustees personally to retain moneys for their own personal use. I am very doubtful whether the judge would have allowed them costs on a higher scale than solicitor and client, and I find no indication whatever in the words which he used, or, at any rate, no sufficient indication, that he ever meant them to have more than that which the order stated, which was drawn up in conformity with the words which he used and in conformity with the interpretation of his intentions by the junior counsel who by the judge's direction settled the minute.

The order of Wynn-Parry J. dated July 5, 1951, was perfectly plain in its terms. The costs of all the parties to that action were to be taxed as between solicitor and client; it must always be remembered that a taxation as between solicitor and client is not a taxation on an indemnity basis, but is, as was described by Buckley L.J. in *Giles* v. *Randall*,[1] "substantially a party and "party taxation on a more generous scale."

I know that it is generally considered that trustees are always entitled to their costs on an indemnity basis, and there is a certain amount of truth in that, provided always that the costs in question have been incurred solely for the purpose of benefiting the trust estate. There is no such rule—certainly I can find no trace of there being any such rule—where the litigation, for it is litigation that we are speaking of in this case, was designed to define and secure the personal rights of the trustees as individuals, and I

---

[1] [1915] 1 K.B. 290, 295.

I cannot see on what ground it could be said that it would follow as a natural consequence that if the judge was asked, he would have said that as trustees they were entitled to be fully indemnified.

In the old case of *Poole* v. *Pass*,[2] counsel was very careful to ask for some additional words to be put in the order to entitle his clients to something more than the solicitor and client costs of an action, something for the extra costs and expenses incident to and arising out of the action. In the action before Wynn-Parry J. the order was drawn up by junior counsel and no suggestion was ever made that the trustees ought to have had anything more than their costs as between solicitor and client.

It is submitted, however, on their behalf, that when they obtain their costs as between solicitor and client and then incur expenses in connexion with the action over and above those costs as so taxed, they are entitled to reimburse themselves by resorting to the trust capital and by taking out the difference between what was allowed on taxation and what they think ought to have been allowed, or what they would like to have been allowed. I do not think that is a matter to which I ought to give the slightest approval. See what it amounts to. It amounts to this, that the defendants would then be saying to the taxing master: "Tax our costs as between solicitor and client. Disallow anything "you like. It does not matter to us in the very least how you "tax these costs because we shall, as a matter of right, take out "of the trust estate and put into our own pockets the whole of "our bill of costs whether you allow it or disallow it." I am quite certain that the trustees never realised that that was what they were doing; but I very much hope now that they do realise it, that they will see at once that it was extremely improper to allow the taxing master to tax their costs when they had the intention, possibly then not wholly formed, of disregarding the taxation altogether, and considering themselves as being entitled not only to the taxed costs, but to the costs which had been taxed off.

Moreover, I am very doubtful whether the trustees have adopted the right course if they wished seriously to make this claim. I think that their proper course would have been to have referred the question to Wynn-Parry J., and asked him to make some amendment to his order and endeavoured to persuade him—I find nothing to suggest that such an attempt would have been successful—that there had been a slip in the order, and that he

---

[2] 1 Beav. 600.

1953

DARGIE, DECD., *In re.*

that is to say, the whole of the amount so paid and retained over and above the taxed costs. The costs of this application must be paid by the defendants personally as between party and party.

Declaration accordingly.

Solicitors: *Ballantynes; Jaques & Co.*

1953
July 2, 13.

Vaisey J.

In re LORD BROUGHAM AND VAUX'S SETTLED ESTATES.

[1952 B. 2577.]

Settled Land—Improvements—Payment out of capital moneys—Settled Land Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 18), *ss.* 73 (1) (*iv*), 84, 87—*Agricultural Holdings Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *ss.* 81 (1), *Sch. III, para.* 23.

By an agreement dated June 2, 1948, the trustees of a settlement, to whom the tenant for life had assigned his equitable life interest, agreed to let agricultural land to a company, the tenant for life being joined as surety.

Between June and December, 1948, the tenant for life caused works to be executed on the demised land, part of which works were improvements in the strict sense, and part repairs.

On a summons to determine whether the cost of all the works was payable out of capital moneys by virtue of sections 84 and 87 of the Settled Land Act, 1925, and section 81 (1) of the Agricultural Holdings Act, 1948[1]:—

Held, that the cost of all the works in question was so payable, for although the tenant for life was not at the material time

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

---

[1] Agricultural Holdings Act, 1948, Sch. III, Pt. II, para. 23 [substituted by s. 96 of the Act for the relevant provision in the Act of 1923]: "Repairs to fixed equipment, being "equipment reasonably required for "the proper farming of the holding, "other than repairs which the tenant "is under an obligation to carry out."

S. 81: "(1) Where under powers "conferred by the Settled Land Act, "1925, . . . capital money is applied "in or about the execution of any "improvement specified in the Third "Schedule to this Act no provision "shall be made for requiring the "money or any part thereof to be "replaced out of income, and accordingly any such improvement shall "be deemed to be an improvement "authorized by Part I of the Third "Schedule to the Settled Land Act, "1925."

entitled to the rents and profits of the demised property, nevertheless he came within the definition of the word "landlord" contained in section 73 (1) (iv) of the Settled Land Act, 1925,[2] as a person having the powers of a tenant for life; and, further, that although there was a tenant responsible for repairs, nevertheless, improvements, which could be paid for out of capital moneys included, without qualification, "repairs to fixed equip-"ment . . . required for the proper farming of the holding . . ." because the subsequent words of para. 23 of Part II of Sch. III to the Agricultural Holdings Act, 1948,[1] viz., ". . . other than "repairs which the tenant is under an obligation to carry out" were not to be imported into the Settled Land Act, 1925.

In re Duke of Northumberland, decd. [1951] Ch. 202; 66 T.L.R. (Pt. 2) 1045; [1950] 2 All E.R. 1181 followed.

ADJOURNED SUMMONS.

Under a trust instrument ("the settlement") dated April 16, 1931, certain estates in Westmorland, Cumberland and Somerset, were settled in trust for the applicant, the 4th Baron Brougham and Vaux for life without impeachment of waste, with divers remainders over.

By a deed of family arrangement dated March 22, 1932, the applicant conveyed and assigned to the 1931 settlement trustees his equitable life interest in the settled lands and in the capital moneys subject to the settlement upon the trusts therein declared concerning the same.

By a subsidiary vesting deed dated March 3, 1948, certain freehold property known as Allington Grange and Battens Farm, situated at Allington in the county of Wilts., was conveyed to the applicant to hold the same upon the same trusts as were declared by the settlement.

By an agreement dated June 2, 1948, and made between the settlement trustees of the first part who were thereafter called the landlords (which expression where the context admitted included the persons for the time being entitled in reversion immediately expectant on the tenancy created), the applicant of the second part (thereafter called the surety), and Grazing Estates Ld. (the tenant) of the third part, the landlords agreed

---

[1] See note on p. 24.

[2] Settled Land Act, 1925, s. 73 (1): "Capital money arising under "this Act . . . shall . . . be . . . "applied . . . in one . . . of the fol-"lowing modes (namely) . . . (iv) in "payment as for an improvement "authorized by this Act of any money "expended and costs incurred by a "landlord under or in pursuance of "the Agricultural Holdings Act, "1923, . . . in or about the execu-"tion of any improvement comprised "in Part I or Part II of the First "Schedule to the said Agricultural "Holdings Act."

1953

DARGIE, DECD., *In re.*

that is to say, the whole of the amount so paid and retained over and above the taxed costs. The costs of this application must be paid by the defendants personally as between party and party.

Declaration accordingly.

Solicitors: *Ballantynes; Jaques & Co.*

1953
July 2, 13.

Vaisey J.

In re LORD BROUGHAM AND VAUX'S SETTLED ESTATES.

[1952 B. 2577.]

Settled Land—Improvements—Payment out of capital moneys—Settled Land Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 18), *ss.* 73 (1) (*iv*), 84, 87—*Agricultural Holdings Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *ss.* 81 (1), *Sch. III, para.* 23.

By an agreement dated June 2, 1948, the trustees of a settlement, to whom the tenant for life had assigned his equitable life interest, agreed to let agricultural land to a company, the tenant for life being joined as surety.

Between June and December, 1948, the tenant for life caused works to be executed on the demised land, part of which works were improvements in the strict sense, and part repairs.

On a summons to determine whether the cost of all the works was payable out of capital moneys by virtue of sections 84 and 87 of the Settled Land Act, 1925, and section 81 (1) of the Agricultural Holdings Act, 1948[1]:—

Held, that the cost of all the works in question was so payable, for although the tenant for life was not at the material time

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

---

[1] Agricultural Holdings Act, 1948, Sch. III, Pt. II, para. 23 [substituted by s. 96 of the Act for the relevant provision in the Act of 1923]: "Repairs to fixed equipment, being "equipment reasonably required for "the proper farming of the holding, "other than repairs which the tenant "is under an obligation to carry out."

S. 81: "(1) Where under powers "conferred by the Settled Land Act, "1925, . . . capital money is applied "in or about the execution of any "improvement specified in the Third "Schedule to this Act no provision "shall be made for requiring the "money or any part thereof to be "replaced out of income, and accord"ingly any such improvement shall "be deemed to be an improvement "authorized by Part I of the Third "Schedule to the Settled Land Act, "1925."

entitled to the rents and profits of the demised property, nevertheless he came within the definition of the word "landlord" contained in section 73 (1) (iv) of the Settled Land Act, 1925,[2] as a person having the powers of a tenant for life; and, further, that although there was a tenant responsible for repairs, nevertheless, improvements, which could be paid for out of capital moneys included, without qualification, "repairs to fixed equipment . . . required for the proper farming of the holding . . ." because the subsequent words of para. 23 of Part II of Sch. III to the Agricultural Holdings Act, 1948,[1] viz., ". . . other than "repairs which the tenant is under an obligation to carry out" were not to be imported into the Settled Land Act, 1925.

In re Duke of Northumberland, decd. [1951] Ch. 202; 66 T.L.R. (Pt. 2) 1045; [1950] 2 All E.R. 1181 followed.

ADJOURNED SUMMONS.

Under a trust instrument (" the settlement ") dated April 16, 1931, certain estates in Westmorland, Cumberland and Somerset, were settled in trust for the applicant, the 4th Baron Brougham and Vaux for life without impeachment of waste, with divers remainders over.

By a deed of family arrangement dated March 22, 1932, the applicant conveyed and assigned to the 1931 settlement trustees his equitable life interest in the settled lands and in the capital moneys subject to the settlement upon the trusts therein declared concerning the same.

By a subsidiary vesting deed dated March 3, 1948, certain freehold property known as Allington Grange and Battens Farm, situated at Allington in the county of Wilts., was conveyed to the applicant to hold the same upon the same trusts as were declared by the settlement.

By an agreement dated June 2, 1948, and made between the settlement trustees of the first part who were thereafter called the landlords (which expression where the context admitted included the persons for the time being entitled in reversion immediately expectant on the tenancy created), the applicant of the second part (thereafter called the surety), and Grazing Estates Ld. (the tenant) of the third part, the landlords agreed to let to the tenant, inter alia, the farms known as Allington Grange and Battens Farm from March 1, 1948, for one year certain and thereafter from year to year.

---

[1] See note on p. 24.

[2] Settled Land Act, 1925, s. 73 (1): "Capital money arising under "this Act . . . shall . . . be . . . "applied . . . in one . . . of the following modes (namely) . . . (iv) in "payment as for an improvement "authorized by this Act of any money "expended and costs incurred by a "landlord under or in pursuance of "the Agricultural Holdings Act, "1923, . . . in or about the execution of any improvement comprised "in Part I or Part II of the First "Schedule to the said Agricultural "Holdings Act."

During the months of May, 1948, to January, 1949, the applicant was in negotiation with a certain company for the carrying out of considerable improvements, alterations and other works to Allington Grange and Battens Farm, and for the supply of certain farming equipment and machinery to be used in connexion with the farming operations carried on at these farms. The applicant instructed the company to carry out the works, which they agreed to do, on his assurance that the cost would be defrayed out of capital moneys.

The work was carried out and the equipment supplied between June and December, 1948, and the amount due on that account for works was £3,273 17s. 7d.

On August 17, 1950, the applicant was adjudicated bankrupt.

Despite requests by the applicant and his solicitors the trustees of the settlement declined to meet the costs of the works out of capital moneys. Accordingly, the applicant took out the present summons which asked that the trustees of the settlement for the purposes of the Settled Land Act, 1925, might by virtue of the provisions of sections 84 and 87 of the Settled Land Act, 1925, the Agriculture Act, 1947, and section 81 (1) of the Agricultural Holdings Act, 1948, be directed to apply the sum of £3,273 17s. 7d. out of capital moneys in payment for the works and improvements set forth in the schedule to the summons, being improvements executed upon lands subject to the settlement on the direction of the applicant as tenant for life or person having the powers of the tenant for life.

Schedule.

Particulars of Works.

(1) Improvements to Dutch barn—sheeting west end, erecting extra stanchions, repairs to gutters and drainpipes, painting.

(2) Remodelling existing buildings to make new dairy and milking parlour, meal store and sterilizing room.

(3) Improvements to and remodelling existing cowsheds and yard.

(4) Improvements of a general nature—repairs to doors and gates, guttering and drainpipes, painting all existing farm buildings.

(5) Excavating, laying hardcore and concreting new approach road to dairy and farm.
(6) Improvements to mansion house.

B. L. Bathurst Q.C. and *W. F. Waite* for the applicant.

S. Pascoe Hayward Q.C. and *D. A. Thomas* for the respondents, the trustees.

The relevant arguments are sufficiently referred to in the judgment.

Cur. adv. vult.

July 13, 1953. VAISEY J. read the following judgment: The applicant in this summons is Lord Brougham and Vaux, who is the tenant for life, or a person having the powers of a tenant for life, under the Settled Land Act, 1925, of certain settled lands in the county of Wilts. He asks that sums amounting in the aggregate to £3,273 17s. 7d. may be raised out of capital moneys of the settlement in payment for or reimbursement in respect of certain works and improvements carried out on the settled land between the months of June and December, 1948. The respondents to the summons are the trustees of the settlement for the purposes of the Act.

No serious question seems to arise as to the greater part of this sum, which relates to matters which are improvements under the Act, but there are two headings of expenditure on which doubts are said to exist. They are, (a) a sum of £231 0s. 11d. for "Improvements to Dutch barn; sheeting west end, erecting "extra stanchions, repairs to gutters and drainpipes, painting, "etc.," and (b) a sum of £239 16s. 1d. for "Improvements of "a general nature—repairs to doors and gates, guttering and "drainpipes, painting of existing farm buildings, etc." Some of the items thus briefly specified may well be improvements in the fullest sense, but it is equally plain that others are mere repairs. To distinguish between "improvements" and "repairs" in this case would appear to involve a difficult and expensive inquiry, but, in my judgment, these two sums of money may properly be allowed under the authority, so far as they are only for repairs, of *In re The Duke of Northumberland, decd.*,[1] on which I desire to say in the first place that I am glad that Harman J. in *In re Sutherland Settlement Trusts*[2] has pointed out an error for which I was there responsible.

---

[1] [1951] Ch. 202.

[2] [1953] 2 W.L.R. 1163, 1174; [1953] 2 All E.R. 27.

1953

BROUGHAM AND VAUX (LORD), *In re.*

Vaisey J.

Several points were taken by the respondents at the hearing; it was suggested that the present applicant did not satisfy the description of "landlord" as construed by me in the *Northumberland* case [3] because he was not at the material time entitled to receive the rents and profits of the property. In my judgment, however, he is within the definition as a person having the statutory powers. It was also urged that the words ". . . "other than repairs which the tenant is under an obligation to "carry out" in para. 23 of Part II of Sch. III to the Agricultural Holdings Act, 1948, were part of the description of the improvement mentioned in section 81 of that Act, and that, as here there was a tenant responsible for repairs, the paragraph was not available to the applicant in the present case. I do not think that this is the right view. The words in question appear to me (like the headings of the two parts of Sch. III to the Act of 1948) not to be imported into the Settled Land Act, 1925, with the result that improvements which can be paid for out of capital moneys include "repairs to fixed equipment . . . reasonably required for "the proper farming of the holding" without qualification. It is difficult to suppose that section 73 (1) (iv) of the Settled Land Act, 1925, was not intended to import into the Settled Land Act the additional improvements, having regard to their nature as improvements, and disregarding every reference in any Agricultural Holdings Act to the particular relationship between agricultural landlord and agricultural tenant. Of course, the two kinds of Act, having different subject-matters, are difficult to fit together, but the form of section 81 (1) of the Agricultural Holdings Act, 1948, seems to me fully to justify my treating the question broadly.

I will allow the application as regards the whole amount in question. The capital moneys must also provide the costs of the application on both sides, and such costs must be taxed as between solicitor and client.

Declaration accordingly.

Solicitors: *Sharpe, Pritchard & Co. for A. G. Smith & Co., Melksham; Tylee & Co.*

---

[3] [1951] Ch. 202.

In re ADLARD. TAYLOR *v.* ADLARD.

1953
Oct. 28;
Nov. 12.

Vaisey J.

[1952 A. 3655.]

Settlement—Voluntary settlement—Covenant to settle after-acquired property—Receipt of property by trustees—Application by covenantor to avoid covenant—Relief in equity sought.

By four settlements, dated June 14, 1918, a father settled life interests in £3,500, on each of his four daughters (three of whom were then unmarried). The settlements contained covenants by the daughters to settle after-acquired property. In 1951, the three unmarried daughters (all of whom had married in the meantime) wished to obtain possession of certain funds, which had become subject to the covenants, but believed at the time that they had no power to do so. Schemes for division were proposed in that year, and in 1952 the schemes were carried into effect and the trustees of the three settlements were placed in full possession of the investments allocated to those settlements.

There were a number of persons who took interests in the settled funds when the daughters' respective life interests fell in.

The trustees having taken out a summons to determine whether the covenants affecting after-acquired property were binding:—

Held, that, even assuming that the covenants would not have been enforceable against any of the sisters, they were not entitled either at law or in equity to deprive the trustees of what they held in fact and in accordance with the settlements; and that the investments were, consequently, subject to the covenants contained in the settlements.

In re Bowden [1936] Ch. 71 considered.

ADJOURNED SUMMONS.

On June 14, 1918, Rupert Darnley Anderson executed settlements on the four daughters of his marriage—Mrs. Adlard, Mrs. Campbell, Mrs. Fulton (all of whom were spinsters at the date of the settlements) (hereinafter called " the three sisters ") and Mrs. Shuttleworth (who was already married). All the settlements contained the provisions and covenants set out below. After reciting that the settlor intended to transfer to the trustees £3,500 5 per cent. War Loan 1929/47 and that the daughter was " desirous of settling her after-acquired property in manner " hereinafter appearing " the settlement proceeded as follows: " Now this indenture witnesseth that in pursuance of his said " intention and in consideration of his love and affection for his " daughter [the settlor] doth hereby covenant with the trustees " that he will forthwith transfer [the said sum to the trustees]. " . . . And it is hereby agreed and declared " [certain trusts follow with regard to this fund]. "And this indenture also "witnesseth that in pursuance of her said desire the said "[daughter] doth hereby covenant with the trustees that any "real and personal property to which she shall at any time "hereafter become entitled whether in possession reversion or "otherwise except jewels furniture and other personal effects "and except also any legacy or other property acquired at one "and the same time not exceeding in amount the sum of £200 "and except also the income or accumulations of income "(whether invested or not) of any fund or property in which she "may have an interest shall so soon as circumstances will admit "and at the cost of the trust estate be assigned and assured by "the [daughter] and all other necessary parties to or otherwise "vested in the trustees upon trust that the trustees [shall stand "possessed of the settled funds] upon the trusts and with and "subject to the powers and provisions hereinafter declared and "contained concerning the said trust fund and the income thereof "respectively save and except that if there shall be no child "of the said [daughter] who being a son shall attain the age of "twenty-one years or being a daughter shall attain that age or "marry then (subject to the trusts and powers by virtue of these "presents affecting the said after-acquired property and capable "of taking effect) the trustees shall hold the said after-acquired "property and the investments and securities for the time being "representing the same upon trust for such person or persons "and for such purposes as the said [daughter] shall by will or "codicil appoint and in default of such appointment in trust for "the person or persons who under the statutes for the distribution of the effects of intestates would on the decease of the said "[daughter] have been entitled thereto if she had died possessed "thereof intestate and without having been married such persons "if more than one to take as tenants in common in the shares "in which the same would have been divisible between them "under the same statutes and it is hereby declared that it shall "not be obligatory upon the trustees to . . . see to the "settlement of any property of the said [daughter] and no act "or omission in any such respect shall be chargeable as a breach "of trust."

In 1951, each of the three sisters expressed a wish to receive for herself her share in all the funds which had become subject to the after-acquired property covenants contained in the settlements but was advised that she was bound to give effect to her covenant. Schemes for the division of the various funds were proposed. In 1952 the schemes were carried into effect and the trustees of the respective settlements were placed in full possession of the investments allocated to the respective settlements, and by the end of that year the funds were held by them entirely and exclusively on the trusts of the three settlements.

A summons was taken out by the trustees of the settlements to determine as to the shares of each of the three sisters in the funds, (1) whether (each of the three sisters claiming to be entitled to her share in the funds free from and notwithstanding the covenant for settlement entered into by her in the settlement made by her and claiming that such covenant ought not to have been or to be treated as binding her share or interests) all or some and which of such shares were, by virtue of the covenant, subject to the trusts of the settlement containing the covenant and ought to be retained by the trustees or whether their shares ought to be transferred or paid to each sister as her absolute property, and (2) generally what was the position of the shares having regard to the covenants.

L. H. L. Cohen for the plaintiffs.

Raymond Jennings Q.C. and *W. A. Bagnall* for daughters of the settlor. The covenants, being covenants in a voluntary settlement, were not enforceable, and the trustees of these voluntary settlements were not empowered to give a good receipt for the funds. The facts are similar to those in *In re Brooks' Settlement Trusts.*[1] *In re Bowden*[2] is distinguishable, because, there, the settlor constituted the trustees her attorneys to receive any property which might become hers. [Reference was also made to *In re Ellenborough*[3] and *Allcard* v. *Walker.*[4]]

Neville Gray Q.C. and *W. F. Waite* for infant defendants. In this case the funds came into the hands of the trustees; they came into full possession of the investments allocated to the respective settlements. It is, therefore, too late now for the daughters to seek to prevent the covenants to settle after-acquired property from being enforced, even if it had been possible for them to repudiate those covenants at an earlier stage; as soon as the trustees received the money they were bound to hold it on the

---

[1] [1939] Ch. 993; 55 T.L.R. 914; [1939] 3 All E.R. 920.

[2] [1936] Ch. 71.

[3] [1903] 1 Ch. 697.

[4] [1896] 2 Ch. 369.

1953

ADLARD,
In re.
TAYLOR
v.
ADLARD.

trusts of the settlements. [*In re Ellenborough* [5]; *In re Bowden*,[6] and *Allcard* v. *Walker* [7] were referred to.]

Cur. adv. vult.

November 12. VAISEY J. The late Rupert Darnley Anderson was married once only, namely, to a Miss Harland, and I will refer to them respectively as " the father " and " the mother." He died on December 23, 1944; she on August 25, 1951. Of their marriage there was issue, a son and four daughters. The eldest daughter, the defendant Mrs. Adlard, has had issue, two children, both of whom attained the age of 21 years, are married and have issue. Mrs. Adlard is now 63 years of age. The second daughter, the defendant Mrs. Shuttleworth, was married in 1917, and on her marriage there was a settlement similar to those of her sisters with which this case is concerned, but she is not a party to these proceedings. The third daughter, the defendant Mrs. Campbell, aged 55, has two adult children and an infant grandchild. The fourth daughter, the defendant Mrs. Fulton, is 56 years of age, is a widow, and never had any issue.

At the date of the three settlements mentioned in the title of this action, namely, June 14, 1918, Mrs. Adlard, Mrs. Campbell and Mrs. Fulton had all attained 21 but were spinsters. One of these settlements was made on Mrs. Adlard, another on Mrs. Campbell and a third on Mrs. Fulton. I will refer to these three ladies as " the sisters " and to their settlements as " the " three settlements." In each case the parties to the settlement were (1) the father; (2) the daughter concerned, in addition to the original trustees. Each of the settlements recited that the father intended to transfer the sum of £3,500 5 per cent. War Loan to the trustees of the settlement to be held on the trusts thereinafter declared, and also that the daughter, party thereto, was desirous of settling her after-acquired property in the manner thereinafter appearing.

Each of the three settlements provided as follows: (A) The father, in pursuance of his said intention and in consideration of his love and affection for his daughter, party thereto, covenanted with the trustees to transfer the said sum of War Loan to them, and the expression " the said trust fund " used therein was defined as meaning the War Loan and the investments from time to time representing the same. (B) The trust fund was to be held in trust to pay the income thereof to the daughter, party thereto, during her life, and subject thereto she was given a power of appointment by deed or will among her children or issue with a trust in default of appointment for all her children who should attain the age of 21 years or being daughters attain that age or marry under that age in equal shares. (C) If there should be no child of the said daughter who should attain a vested interest, then subject as aforesaid the trustees were to hold the trust fund in trust for the statutory next-of-kin of the daughter (and this is of course material in the case of Mrs. Fulton). (D) Such daughter was empowered by deed executed before and in contemplation of any marriage or by will to appoint to or for any husband who might survive her an interest for his life in all or any part of the trust fund. (E) In pursuance of her said desire the daughter, party thereto, covenanted with the trustees that any real or personal property to which she should at any time thereafter become entitled whether in possession, reversion or otherwise except (i) personal effects; (ii) any legacy or other property acquired at one and the same time not exceeding in amount £200; and (iii) the income or accumulations of income (whether invested or not) of any fund or property in which she might have an interest should as soon as circumstances would admit and at the cost of the trust estate be assigned and assured by her and all other necessary parties to the trustees upon trust to retain or sell as therein provided and to hold the same or the proceeds of sale on the trusts and with and subject to the powers and provisions thereinbefore declared and contained concerning the said trust fund save and except that if there should be no child of the said daughter who should attain the age of 21 years or being female attain that age or marry, then (subject to the foregoing trusts and powers) the trustees should hold the said after-acquired property and the investments representing the same upon trust for such persons and purposes as such daughter should by will appoint and in default of such appointment in trust for the statutory next-of-kin of such daughter as in the case of the trust fund as already mentioned. (F) It was declared that it should not be obligatory on the trustees to see to the settlement of any property of the said daughter and no act or omission in such respect should be chargeable as a breach of trust.

---

[5] [1903] 1 Ch. 697.

[6] [1936] Ch. 71.

[7] [1896] 2 Ch. 369.

In the case of each of the three settlements: (i) The father duly transferred the sum of £3,500 War Loan to the trustees. (ii) The plaintiffs, since the year 1934, have been and they still are the trustees of such settlement. (iii) The income of the War

Loan or the investments representing the same has been paid to the daughter, party to such settlement, since the date of the settlement. (iv) No appointment has been made by such daughter under any of the powers in such settlement contained. (v) Before the death of the mother nothing had been actually transferred to the trustees of such settlement under the covenant therein contained for settlement of after-acquired property.

The property affected or supposed to be affected by the several covenants, is the following: (A) Under a marriage settlement dated January 1, 1889 (hereinafter called " the parents' marriage " settlement "), made on the marriage of the father and the mother two funds were thereby settled, namely a husband's fund settled by the father and a wife's fund settled by the mother, and subject to their successive life interests in such funds the parents had a joint power of appointment by deed among their issue with the usual trust in default of appointment for their children, and by a deed dated June 1, 1934 (hereinafter called " the 1934 appointment ") the father and the mother irrevocably appointed both funds in equal shares to their four daughters, namely the sisters and Mrs. Shuttleworth. The plaintiffs have been the trustees of the parents' marriage settlement since the year 1934. Estate duties became payable on the husband's fund on the death of the father and on the wife's fund on the death of the mother. The net values of these funds, after providing for the said duties, are respectively about £8,000, for the husband's fund, and about £16,000 for the wife's fund.

(B) On May 5, 1943, the father made a voluntary settlement (hereinafter called " the 1943 settlement ") of which the plaintiffs were trustees and have throughout been the trustees. By such settlement the father settled a fund on trust for the mother during her life and on her death (in the events which have happened) on trust for his said four daughters in equal shares. As the death of the father occurred within three years of the making of the 1943 settlement, estate duty became payable in respect of the said settled fund and the value thereof after payment of such duty is about £40,000.

(C) By his will, which was dated June 4, 1934, and proved on April 16, 1945, in the principal probate registry by the mother and the plaintiff Geoffrey Lewis Taylor, the executors and trustees thereby appointed, the father settled his residuary estate on trust to pay the income thereof to the mother during her life and conferred on her a power to appoint any part of his residuary estate up to a sum of £10,000 to or for all or any of his said daughters to take effect after her death, and subject to any exercise of that power his residuary estate was settled on trust as to one equal fourth part for each of his said four daughters during her life with remainder on trusts for her children or issue. By a deed dated February 12, 1947, General Sir Robert Hadden Haining was appointed an additional trustee of the father's will and ever since the death of the mother he and the said plaintiff have been the trustees of such will.

(D) The mother, by her will dated December 17, 1947, and proved on October 26, 1951, exercised the said power of appointment given to her by the will of the father and appointed the sum of £10,000 (hereinafter called "the £10,000 appointed "fund") in equal shares to her said four daughters absolutely. She also bequeathed her net residuary estate to her said four daughters in equal shares and such net residuary estate is believed to be of the value of about £8,000. The executors and trustees of the will of the mother were and are William Helm Hadfield and the plaintiff Claude Pritchard Lewis.

There can be no doubt that according to the tenor of the after-acquired property covenants contained in Mrs. Shuttleworth's settlement and in each of the three settlements of 1918, the share of Mrs. Shuttleworth and the sisters in each of the funds hereinbefore mentioned was affected, that is to say: (A) the husband's fund comprised in the parents' marriage settlement and the appointment of 1934; (B) the wife's fund comprised in the same settlement and appointment; (C) the fund comprised in the settlement of 1943, and (D) the £10,000 appointed fund. The shares of the three sisters in the net residuary estate of the mother under her will would also be so affected, but the trustees of the three settlements (being the plaintiffs in each case) have elected to take no steps to get them in as they had power to do, as I have already mentioned. Mrs. Shuttleworth's settlement, executed on her marriage, stands on a somewhat different footing to the three settlements and need not be further mentioned.

After the mother's death and when the sisters realized the terms in which they had covenanted, it came as something of a shock to them, and each expressed the strong wish to receive for herself her share in all the before-mentioned funds. For a considerable time all the parties were of opinion and convinced that the covenants could be and should be and must be enforced, and before the end of the year 1951 schemes of division of the

1953

ADLARD,
In re.
TAYLOR
v.
ADLARD.

Vaisey J.

various funds were prepared and submitted to the four daughters with intimations in each case that she would not be entitled to receive her share for herself, but that it would be made over to the trustees of her settlement. None of the daughters raised any objection to the proposal, for the reason that all of them believed that they had no power to do so, and in that belief they accepted the schemes for division. In the month of January, 1952, the schemes were carried into effect and the trustees of the various settlements were placed in full possession of the investments allocated to the respective settlements. It so happened that such trustees were in fact the same persons as were trustees of the parents' marriage settlement and of the settlement of 1943. But I understand that by the end of January, 1952, they had fully discharged all their duties in respect of such last-mentioned trusts, and the funds were held by them entirely and exclusively on the trusts of the three settlements. The amounts are considerable, as I have said. The husband's fund is £8,000; the wife's fund £16,000; the fund in the 1943 settlement £40,000, and then there is the £10,000 fund.

Now, it may well be that the covenants would not have been enforceable against any of the sisters if it had been necessary to invoke the assistance of the court to enforce them. I thought at one time that the original settlements of the £3,500 War Loan were made by the father in consideration of the covenants, although not so expressed, but that may be irrelevant. It further occurred to me that the existence of these covenants might have been the reason why these large sums of money were allowed to go to the four daughters absolutely under the various documents to which I have alluded, and that, but for the existence of those covenants, those funds would have been in some way tied up by the father and the mother, but that again may be irrelevant. In any case, there is no evidence of this, and it is quite likely that the existence of the covenants was not present to the mind of their parents any more than it was present to the minds of the daughters. But the fact remains that the covenants were entered into.

This case raises a point for which I can find no direct authority, which is this. Assuming that the daughters could have arrested these funds and claimed to retain them in breach of their own covenants, can they now claim to recover them from the trustees into whose hands they have in fact come and who hold them on perfectly valid trusts? My difficulty is to see what possible equity the daughters can have to do anything of the kind. It may be unfortunate that they were not aware of their possible right to repudiate their obligations at an earlier stage, but it seems to me that the trustees of the three settlements are now under an obligation to continue to hold funds which have come into their hands quite regularly by reason of the obligations imposed by the covenants. Whatever may be their personal views on the matter, I do not see that the sisters are entitled either at law or in equity to deprive them of what they hold in fact and hold in accordance with the tenor and true meaning of the three settlements from which their obligations are derived.

The cases which were cited to me seem to me to establish the position of the trustees and to afford no assistance to the claims of the daughters. The general law as to enforceability of the covenants in equity is stated in *In re Ellenborough.*[1] The headnote is: "The decision in *Meek* v. *Kettlewell*,[2] that the voluntary assignment of an expectancy, even though under seal, "will not be enforced by a court of equity, has not been over-"ruled by *Kekewich* v. *Manning.*[3]" But the case nearest to the present seems to me to be *In re Bowden*,[4] to which the headnote reads as follows: "By a voluntary settlement made in "1868 a settlor settled any property to which she might become "entitled upon the death of her father and gave to the trustees "of the settlement full power to receive and give receipts for "the same or any part thereof in her name. Her father died in "1869 and during the years 1871 to 1874 his executors trans-"ferred the share of the settlor under her father's will to the "trustees of the voluntary settlement. In 1935 the settlor "requested the trustees to transfer the funds representing the "above mentioned property to her as her absolute property:— "*Held*, that the original trustees had received the settlor's share "under a valid authority unrevoked, and that it became "impressed with the trusts contained in the settlement." And I will also read from the judgment: "In the year 1935 it seems "to have occurred to the settlor that she might not have settled "what came to her, so on January 23, 1935, she addressed a "communication in writing to the trustees requesting them to "transfer to her as her absolute property the cash representing "the fund. She states that to the best of her knowledge she "never authorized the transfer of any such property to the

---

[1] [1903] 1 Ch. 697.

[2] (1842) 1 Hare 464.

[3] (1851) 1 De G.M. & G. 176.

[4] [1936] Ch. 71, 75.

1953

ADLARD, *In re.* TAYLOR *v.* ADLARD.

Vaisey J.

"trustees of that settlement. Those are the facts which give "rise to the question raised by the summons. Counsel for the "settlor submitted that the question should be answered in the "affirmative and that the property the subject of the trusts of "the settlement should be transferred to her. He based his "argument on the authority of *Meek* v. *Kettlewell* [5] and *In re* "*Ellenborough* [6] and contended that the settlement, being a "voluntary settlement, was void and altogether unenforceable. "Neither of these authorities supports either of his propositions. "All that was decided in *Meek* v. *Kettlewell* [5] was that where "the assistance of the court of equity is needed to enable the "trustees of a voluntary settlement to obtain possession of "property subjected to the trusts of the voluntary settlement, "the property not having been vested in the trustees, a court of "equity will render no assistance to the plaintiff. But here "nobody is seeking the assistance of the court of equity to "enforce the voluntary settlement. Under a valid authority, "unrevoked, the persons appointed trustees under the settlement "received the settlor's interest under her father's will, and, "immediately after it had been received by them, as a result of "her own act and her own declaration, contained in the voluntary "settlement, it became impressed with the trusts contained in "the settlement. No assistance is required from a court of "equity to put the property into the hands of the trustees."

I cannot see that it makes any difference that the period in question here is far shorter. *In re Kay's Settlement* [7] and *In re Brooks' Settlement Trusts*,[8] do not, in my judgment, throw any further light on the matter, nor, I think, does *Allcard* v. *Walker* [9]; and, though I have a good deal of sympathy with the sisters, and acquit them of any kind of impropriety in endeavouring to avoid or even to evade their obligations, I can find no ground on which to give effect to their claim now to undo what they covenanted to do and in fact did, and I will make the consequent declaration with an appropriate order as to the costs of the action. It may be that the sisters, who are said to have had no separate advice when they executed the three settlements and may well have failed to understand the meaning and effect of these covenants, might have had them set aside if they had sought that remedy at a much earlier date. But having enjoyed the income of the £3,500 War Loan for upwards of 30 years, it must surely be too late for that now. In any case, that issue is not before me. While expressing some sympathy with the sisters, I think that obligations solemnly undertaken by them under seal ought not to be too lightly repudiated. I incline to think that there ought in strictness to have been three separate actions here, but I need not take any objection to the proceedings on that ground. There will be a declaration that the respective shares are subject to the trusts contained in the respective settlements, and that the trustees ought to retain such shares on the said trusts.

---

[5] 1 Hare 464.

[6] [1903] 1 Ch. 697.

[7] [1939] Ch. 329; 55 T.L.R. 332; [1939] 1 All E.R. 245.

[8] [1939] Ch. 993.

[9] [1896] 2 Ch. 369.

Declaration accordingly.

Solicitors: *Stanley Attenborough & Co.; Haslewood, Hare, Shirley Woolmer & Co. for W. H. Hadfield & Son, Farnham.*

J. L. D.

In re BROWN, DECD.
DISTRICT BANK LD. AND ANOTHER *v.* BROWN AND OTHERS.

1953
Nov. 3, 4.
Harman J.

[1953 B. No. 2469.]

Will—Condition subsequent—Devise subject to condition—Restraint on alienation—Alienation confined to brothers—Whether valid—Applicability of principle to realty and personalty.

A testator bequeathed his business to his wife for life with remainder to his four sons in equal shares. He devised the freehold properties on which his business was carried on to his trustees in trust for his wife for life, and after her death, on his youngest son attaining twenty-one, for all the sons then living in equal shares as tenants in common.

By clause 6 of the will the testator declared that if any of his sons "shall execute any assurance . . . whereby . . . the share of "my business properties . . . hereinbefore devised or bequeathed to "him would or might become vested in . . . any person or persons "other than a brother or brothers of such son then I direct that "the share of such son in my business properties . . . shall be held "by my trustees . . ." on certain discretionary trusts for the son and his wife and children:—

Held, that the class of permitted alienees being a small and diminishing class, the clause constituted in substance a general prohibition on alienation, and was accordingly void and not binding on the devisees.

1953

Brown, decd., *In re.* District Bank Ld. *v.* Brown.

Attwater v. *Attwater* (1853) 18 Beav. 330 and *In re Rosher* (1884) 26 Ch.D. 801 considered.

Doe d. *Gill* v. *Pearson* (1805) 6 East 173 and *In re Macleay* (1875) L.R. 20 Eq. 186 not followed.

Adjourned summons.

Reginald William Southall Brown made his will on June 4, 1936. He appointed the plaintiffs and his wife (since deceased) as executors and trustees of his will, and trustees of the settlements under the will " for the purposes of the Settled Land Act." He bequeathed his business of a farmer and butcher to his wife for her life, with remainder to his four sons. He devised the freeholds on which his business was carried on (which he described as " my " business properties ") to his trustees on trust for his wife for life and, after her death, until his youngest son should attain twenty-one or die under that age, to divide the rents and profits in equal shares between such of his four sons as should be living and the survivors of them, and then from the date of the youngest son attaining twenty-one, or his death under that age whichever should first happen, the " business properties " were to be held on trust " for such of my " said sons . . . as shall be then living and if more than one in " equal shares as tenants in common," with a substitution clause in favour of the children of sons who failed to survive the vesting date. There was a proviso allowing his wife to sell or mortgage under the Settled Land Act, 1925.

Clause 6 provided: " I hereby declare that if any of my said " sons . . . shall execute any assurance or mortgage whereby but " for this present provision the share of my business properties or " of the income thereof or any part thereof hereinbefore devised " or bequeathed to him would or might become vested in or payable to any person or persons other than a brother or brothers " of such son then I direct that the share of such son in my " business properties and the income thereof shall be held by my " trustees in trust to pay or apply the income during the residue " of the life of such son to or for the maintenance and benefit " of such son and any wife child or children of his or the maintenance and benefit of any one or more of such persons to the " exclusion of the other or others in such manner and form in " every respect as my trustees may (without being liable to " account for the exercise of such discretion) in their absolute " discretion think fit And subject thereto upon trust as to both " capital and income for the children of such son who attain the " age of twenty-one years and if more than one in equal shares."

The testator made a residuary gift of his real and personal estate not otherwise disposed of. He died on September 9, 1942. His wife died on October 18, 1947. The youngest son attained twenty-one shortly after her death. All four sons were then living.

At the date of vesting the land ceased to be settled and, by sections 1 (6), 34 and 35 of the Law of Property Act, 1925, and section 36 of the Settled Land Act, 1925, it was held by the trustees on the statutory trusts for sale, and the interest of each son was in the proceeds of sale.

One of the four sons assigned his share of the business properties to his three brothers by an assignment dated August 18, 1949, a second brother was desirous of disposing of his share outside the family. The plaintiffs, by this summons, asked the court to determine whether clause 6 which restricted the sons' power of alienation was binding on them.

F. Bower Alcock for the plaintiffs.

R. J. S. Thompson for infants interested under the discretionary trusts arising under the forfeiture clause. A forfeiture clause is, on the authorities, valid provided that it does not constitute an absolute bar on alienation. The principle was first laid down in Coke on Littleton (11th ed., Part 1, book 3, sections 360 and 361), where he states that a prohibition on alienating to a particular person is good. A condition restricting alienation to a sister or sisters was held to be valid in *Doe* d. *Gill* v. *Pearson.*[1] That decision was not followed in *Attwater* v. *Attwater*,[2] where a direction in a devise not to sell out of the family, but to a named brother, was held inoperative. *Attwater* v. *Attwater*[2] was distinguished, however, by Sir George Jessel M.R. in *In re Macleay*,[3] where a devise to a brother on condition that he never sold out of the family was held good. The judge said in that case that the test was whether the condition took away the "whole power of "alienation substantially." That is still the test to be applied today; the court must consider whether the condition is in terms an absolute prohibition, but if, as here, the prohibition is not absolute, it will be good. The criticism of *In re Macleay*[3] in *In re Rosher*[4] was in fact obiter, as the restraint there was held to be absolute. *In re Rosher*,[4] therefore, does not detract from *In re Macleay.*[5]

---

[1] (1805) 6 East 173.

[2] (1853) 18 Beav. 330.

[3] (1875) L.R. 20 Eq. 186, 189.

[4] (1884) 26 Ch.D. 801.

[5] L.R. 20 Eq. 186.

Where the limitation is illusory and the power to alienate, albeit limited, is real, then the condition is good. That position follows from Coke and *Doe* d. *Gill* v. *Pearson*[6] and *Attwater* v. *Attwater.*[7] An absolute restriction has always been considered invalid, and it is not sought to uphold that sort of condition; if (which is not the case here) it could be said that the power which was left was purely illusory, as in *Muschamp* v. *Bluet*,[8] then the condition would be invalid. It is settled law that an attempt to prevent alienation of an absolute interest previously given is void. This will does not expressly say anywhere that the gift to the sons was absolute. [Reference was made to *In re Dugdale*[9] and *In re Cockerill.*[10]]

After the date of vesting the property was held on trust for sale for the sons, who were interested in the proceeds of the sale, but there is nothing in the Law of Property Act, 1925, which is intended to affect the position relating to conditions in restraint of alienation in respect of the proceeds of sale.

John Willcock, for persons interested under the discretionary trusts arising under the forfeiture clause, was instructed not to argue.

J. A. Armstrong for the sons of the testator. The restriction in clause 6 is invalid. The condition is void in that it constitutes in substance an absolute restraint on alienation during the lifetime of each of the sons, or, alternatively, that it imposes in terms an absolute restraint during the survivorship of the last son. The position as to conditions in restraint of alienation is summarized in Jarman on Wills (8th ed., Vol. 2, p. 1476). It is not possible to contend that any condition against alienation is bad in face of Coke, which appears to justify it. A limited restraint on alienation may be good, but the condition here amounts to an absolute restraint. It is on all fours with that in *Attwater* v. *Attwater*,[11] and it is submitted that that case should be followed rather than the cases upholding restrictions on alienation. If this clause be held valid, there must come a point of time before it is exhausted, when it becomes an absolute bar.

The devise was to the sons as tenants in common, which must be an absolute gift, but the sons' interest in the corpus is contingent on their surviving the vesting date, and the clause will be bad if it is only to operate after these interests take effect.

---

[6] 6 East 173.
[7] 18 Beav. 330.
[8] (1617) Bridgm. (J.) 132.
[9] (1888) 38 Ch.D. 176.
[10] [1929] 2 Ch. 131.
[11] 18 Beav. 330.

An alternative construction is that the clause operates only during the period of contingency, i.e., until the property vests in possession. To that extent the clause would be valid, and all difficulties would be removed. During the period of contingency the property is settled land, but after the vesting date the property is held on trust for sale, and the sons are only interested in the proceeds of sale: see section 36 of the Settled Land Act, 1925. A restriction on alienation can only operate against land, and not against interests in the proceeds of the sale of land. A beneficiary is prima facie entitled to call on the trustees for his share of the proceeds of sale: see *In re Sandeman's Will Trusts* [12] and *In re Marshall.*[13] If the clause be held only to operate before vesting this question does not arise. Clause 6, if operative after the vesting date, is inconsistent with the rest of the will, and the court leans against inconsistency in the construction of a will.

All the authorities purport to base themselves on Coke, but he says no more than that a limited restriction is good. If clause 6 is operative after vesting, the class of permitted alienees being a diminishing one, it must become in substance an absolute bar. Where it is possible, the courts adopt a beneficial construction, and it would be fair to apply the approach of Bowen L.J. in *Corbett* v. *Corbett*,[14] where he said that a clause limited to take effect during the lifetime of a person would be good.

HARMAN J. This is a point on which it appears that the authorities give no certain guide, and the various editors of Jarman on Wills give it up, as textbook writers, therein more fortunate than judges, are entitled to do with the bland statement that the law is uncertain.

The point is a very narrow one, and it is whether a restriction on alienation appended to an absolute devise of real estate is good or no. The instinct of any equity lawyer is, to start with, to say that all restraints on absolute interests which tend to negative the rights attached to those interests are abhorred by the law and disallowed. That is a general rule cited by Jarman (8th ed., Vol. 2, p. 1477): "A power of alienation is necessarily and "inseparably incidental to an estate in fee."

The view at the outset is that anything which seeks to deprive the feoffee (so to call him) of his rights is void, but there is no doubt that some degree of restriction may be put upon him.

---

[12] [1937] 1 All E.R. 368.

[13] [1914] 1 Ch. 192.

[14] (1888) 14 P.D. 7.

1953

BROWN, DECD., *In re.* DISTRICT BANK LD. *v.* BROWN.

Harman J.

Under the old law, for instance, a prohibition against assigning in mortmain might be imposed, because that was a thing which the law did not allow; but the early cases lay down that it is not permissible by indirect means to do that which you could not do directly. One must not, in substance, prevent a person from alienating, although in form he is left with a chance so to do. One may not, therefore, restrict his right of alienation to one person or choose some undischarged bankrupt and say that he may alienate to him. That is, in substance, although not in form, an absolute bar; as illustrated in *Muschamp* v. *Bluet.*[1]

[His Lordship stated the facts, and continued:] It will be observed that the sons' interests in the business property are contingent until the time arrives for the vesting in possession, and when that occurs it is an absolute vesting in them as tenants in common. Under the modern doctrine it is not possible to have undivided shares in land so that when the land ceases at the date of vesting to be settled land, a statutory trust for sale is imposed and the interests of the four sons are only interests in the proceeds of sale. That, I think, makes no difference, as the doctrine seems to apply to personalty as well as it does to realty.

Clause 6 of the will is a very odd provision. If the forfeiture be good, then if a son dispose of his interest to persons other than his brothers, there will be, during his lifetime, a kind of discretionary trust and a remainder to his children, if he have any, and, if not, it will fall into residue. If, on the other hand, he does not forfeit, he may, I suppose, leave his share of the property by will away from his children altogether, which seems an odd result. However that may be, in fact one of these four brothers did alienate to his brother his share in the business properties, and there are now three left interested, and one of them wishes to know, if he mortgages or assures his share outside the magic circle, whether a forfeiture will ensue. As I have said, the instinct of any Chancery lawyer is to say that this is a restriction quite inconsistent with an absolute interest in real estate (or in proceeds of sale, for that matter) and that the restriction is not good. Mr. Thompson, however, has been able to persuade me that there is a great deal to be said for the view that a restriction of this sort may be good, if it do not amount to a total restriction. He starts with Coke upon Littleton (11th ed., Part 1, book 3, section 360), where the translation is as follows: " Also if a feoffment be made upon this condition, that

---

[1] (1617) Bridgm. (J.) 132.

" the feoffee shall not alien the land to any, this condition is void " because when a man is enfeoffed of lands or tenements, he hath " power to alien them to any person by the law: For if such a " condition should be good, then the condition should oust him " of all the power which the law gives him, which should be " against reason; and therefore such a condition is void." That is to say, it is repugnant to the gift. The passage following (section 361) is in these terms: " But if the condition be such " that the feoffee shall not alien to such a one, naming his name, " or to any of his heirs, or of the issues of such a one, etc. or the " like, which conditions do not take away all power of alienation " from the feoffee, etc., then such condition is good." That merely says that you may point out a certain person (or, I suppose, persons) and prohibit alienation to him or them: quaere as to how many persons may you extend that prohibition? According to two cases to which I shall refer in a moment, you may extend it to all the world except a certain class of people; but that seems to me to be a very curious way to read the doctrine of Coke, which, after all, merely says that you may exclude A or B from the world of people to whom it is permissible to alienate.

The earliest case to which I was referred is a decision of the Court of King's Bench, where the judgment was given by Lord Ellenborough C.J., *Doe* d. *Gill* v. *Pearson.*[2] The gift in that case was of a piece of land to " my daughters . . . Ann and Hannah, " their heirs and assigns for ever, as tenants in common, and not " as joint tenants; *upon this special proviso and condition*, that in " case my said daughters Ann and Hannah Collett, or either " of them, shall have no lawful issue, that then and in such case " they or she having no lawful issue as aforesaid shall have no " power to dispose of her share in the said estates so above " given to them except to her sister or sisters, or to their " children." The exception was confined to sisters and the children of sisters, which is a narrow enough class, although one does not know exactly how many there were in the class. There were five daughters, all of whom had children, but how many children does not appear in the report. It was an action for ejectment, one of the heirs having entered on the footing that there was an intestacy. Lord Ellenborough C.J. said this[2]: " And " thirdly, whether this ejectment can, under the circumstances of " this case, be supported by one of several co-heirs? As to the

---

[2] (1805) 6 East 173, 174, 180.

"first, we think that the condition is good; for according to the "case of *Daniel* v. *Ubley*,[3] . . . though the judges did not agree "as to the effect of a devise 'to a wife, to dispose at her will and "'pleasure, and to give to which of her sons she pleased'; "Jones J. thinking it gave an estate for life, with a power to "dispose of the reversion among the sons; the other judges, "according to his report, thinking it gave her a fee simple in "trust to convey to any of her sons: yet in that case it was not "doubted, but that she might have had given her a fee simple "conditional to convey it to any of the sons of the devisor; and "if she did not, that the heir might enter for the condition "broken. . . ." He purports, therefore, to follow *Daniel* v. *Ubley*,[3] which it appears from his recital of it, would now be decided on the footing that the devisee had a mere life estate with a power of appointment; but in those days the majority of the judges thought that the effect of the devise was to give her a fee simple conditional. In either event it does not seem to me that they were considering a fee simple absolute. Nevertheless the whole court, the Court of King's Bench, decided apparently that the condition not to alienate except to a class consisting of four sisters and their children was good.

That case was considered in *Attwater* v. *Attwater*,[4] where Sir John Romilly M.R. refused to follow the Court of King's Bench, and merely said that, notwithstanding *Doe* d. *Gill* v. *Pearson*,[5] he held the opposite. The limitation in *Attwater* v. *Attwater*[6] was: "I bequeath to *Gay Thomas Attwater*, jun., eldest son of my "niece, the family estate at *Charlton*, *Wilts.*, to become his "property on attaining the age of 25 years, with an injunction "never to sell it out of the family; but, if sold at all, it must be "to one of his brothers hereafter named." He had three brothers. Sir John Romilly declined to hold that condition good; in his judgment he said[6]: "The meaning is, I think, "plain, that the testator intended to impose this fetter:—that if "the brother will not buy, the devisee was not to be at liberty "to sell the property to anyone. The question is, whether such "a condition is a valid one? Notwithstanding the case of *Doe* "d. *Gill* v. *Pearson*,[7] this appears to me to be a condition repug- "nant to the quality of the estate given. It is obvious, that if "the introduction of one person's name, as the only person to

---

[3] (1625–6) Jones (W.) 137; Latch 9, 39, 134.

[4] (1853) 18 Beav. 330.

[5] 6 East 173.

[6] 18 Beav. 330, 331, 336.

[7] 6 East 173.

"whom the property may be sold, renders such a proviso valid, "a restraint on alienation may be created, as complete and "perfect as if no person whatever was named; inasmuch as the "name of the person who alone is permitted to purchase, might "be so selected, as to render it reasonably certain that he would "not buy the property, and that the property could not be aliened "at all. It appears to me also, that this is the true construction "of the words used by the testator; it is, in truth, an injunction "never to sell the hereditaments devised at all. The words 'out "'of the family,' are merely descriptive of the effect of the sale, "and not of the person to whom it might be sold, as is shown by "the two last clauses of a similar character, relating to the devises "to *William* and *Edward Attwater*, which, in referring to this "clause, state that the property is not to be sold out of the family, "as before specified. It is not, in my opinion, desirable to impose "fresh fetters on the enjoyment of property, and it appears to "me, that this proviso is distinctly at variance with the rules laid "down by Lord Coke, and which have always been considered "and treated as good law. I am of opinion, therefore, that this "clause is merely inoperative."

That is a decision on a limitation exactly in pari materia to the one before me. I should feel no difficulty about following it, rather than *Doe* d. *Gill* v. *Pearson*,[7] but for the fact that in *In re Macleay*[8] the great authority of Sir George Jessel appears to be on the other side. In that case the devise was "to my brother J. "on the condition that he never sells out of the family." The limitation was not, therefore, to named persons, it was "out of the "family." Sir George Jessel said[8]: "I have no doubt the family "in question means her blood relations. Looking at the will, I "have no doubt that there is a condition annexed to the gift in fee, "and that, under the word 'property,' the vendor will get the fee "of the freehold manor in question, and mansion-house and lands, "on the condition that he never sells it away from his blood rela- "tions. First of all, it is to be observed that the condition, good or "bad, is confined within legal limits; it is applicable merely to the "devisee himself, and therefore is not void on any ground of "remoteness. It has been suggested, however, that it is void "as being repugnant to the quality of the estate, that is to say, "that you cannot restrict the right of an owner in fee of alienating "in any way in which he may think fit. If that were the law, "the condition would be plainly void. But, with the exception

---

[7] 6 East 173.

[8] (1875) L.R. 20 Eq. 186, 187.

1953

Brown, decd., *In re.* District Bank Ld. *v.* Brown.

Harman J.

"of one authority, a case decided by my immediate predecessor, I am not aware that the law has ever been laid "down in that way." Sir George Jessel then discussed the point in Coke on Littleton, *Muschamp* v. *Bluet*[9]; *Attwater* v. *Attwater*,[10] and *Jacobs* v. *Brett*.[11] He decided[12]: "So that, according to the old books, Sheppard's Touchstone "being to the same effect, the test is whether the condition takes "away the whole power of alienation substantially: it is a "question of substance, and not of mere form." He said that in the case then before him the only restriction was on selling and it would not include a gift. After discussing *Attwater* v. *Attwater*[13] with a certain amount of disparagement, and also *Doe* d. *Gill* v. *Pearson*,[14] he came to the conclusion that the words were not sufficiently restrictive to be in substance an absolute bar. His reason was that "the family" was a larger term than "sister or sisters, or their children" and that the only restriction was to sell and not to dispose, which might include leases or mortgages. He came to the conclusion that the limitation in that case was a good one.

That decision, therefore, inclines to the view for which Mr. Thompson has argued. In *In re Rosher*,[15] however, Pearson J. felt it necessary to make an elaborate attack upon Sir George Jessel's decision in *In re Macleay*.[16] Although the decision in *In re Rosher*[17] was, as a matter of construction that the restriction was in effect an absolute one, Pearson J. delivered a long judgment explaining why he could not agree that *In re Macleay*[18] was well decided. The restriction in *In re Rosher*[19] was that if the testator's "son, his heirs or devisees" wished to sell over a certain period, property worth £15,000 had to be offered to the testator's wife during her lifetime at a price of £3,000; and the judge held that that meant in effect that it could not be sold at all, because nobody would give away property worth £15,000 for £3,000. Although *In re Rosher*,[19] qua its decision, is not of much help, it shows that in the view of Pearson J., *In re Macleay*[20] was wrongly decided.

I need take the law no further. I have to choose one way or the other, unless I can take a way out suggested to me by Mr. Armstrong, which was this, that the prohibition against alienation only applied during the period of contingency; that is to say, the widow's lifetime and the infancy of the youngest son. It would be a comfort to be able to take that course; but, on the true construction of clause 6 (which is a completely separate clause quite unlimited so far as the time of its operation is concerned, appearing to end only with the death of the last surviving son), I cannot hold that its operation is only during the period of contingency. If I could, the will would read more easily, for it is well known that one may, during a suspense of vesting—even during a suspense of vesting in possession—put a bar on an alienation. What is not allowed is to put a bar, if it be a general bar, after a vesting in possession. Mr. Armstrong has pointed out to me the observation of Bowen L.J. in *Corbett* v. *Corbett*,[21] a decision of the Court of Appeal, on appeal from the Probate Division, where it was held possible to limit such a prohibition to the period of contingency. I do not feel able to take that way out of it, and I must face the problem.

---

[9] Bridgm. (J.) 132.

[10] 18 Beav. 330.

[11] (1875) L.R. 20 Eq. 1.

[12] Ibid. 189.

[13] 18 Beav. 330.

[14] 6 East 173.

[15] (1884) 26 Ch.D. 801.

[16] L.R. 20 Eq. 186.

[17] 26 Ch.D. 801.

[18] L.R. 20 Eq. 186.

[19] 26 Ch.D. 801.

[20] L.R. 20 Eq. 186.

It is most pertinent to remember, as Mr. Armstrong has also pointed out to me, that the class to whom it is permissible to alienate begins with three for any one share and that the prohibition goes on not only during the joint lives of all the brothers, but during the lives of the survivors and survivor of them, and therefore a period will be reached when there are two, and then only one, and at last no person to whom any alienation is allowed. If none it is plainly bad. If it is only one, that in substance, as in *Muschamp* v. *Bluet*,[22] is equivalent to none. If one be bad, are two good? It seems to me that a class of this sort, which is bound to be a diminishing class, brings it about, in substance, that this is a general prohibition on alienation. It would be an extraordinary thing if no-one could postulate of any one of these brothers that he would or would not during his lifetime be able to dispose of his own share; and that it must depend on whether he outlives two of his brothers. In my view, this is the kind of restriction which the law views, or should view, with dislike. It is exactly the same kind of condition as in *Attwater* v. *Attwater*,[23] and I think that I should be at liberty to follow that decision were it necessary for me to do so, but I do not think that I need follow any case in this region, because the cases are inconsistent with one another, and I am entitled to take my own view. It is pertinent that a number of persons, as in this

---

[21] (1888) 14 P.D. 7.

[22] Bridgm. (J.) 132.

[23] 18 Beav. 330.

BIBL. LONDIN UNIV.

clause, is in essence different from a class consisting, for instance, as Sir George Jessel's did in *In re Macleay*,[24] of members of the family, which he said was a large indeterminate class of people and might, of course, increase as time went on; whereas, if alienation be restricted to three or four or five persons such as brothers, the class is bound to diminish as death takes its toll of the members. I hold therefore that the restriction in clause 6 of the will is an attempt to fetter the natural qualities of the interest given, and is accordingly void and can be disregarded.

Declaration accordingly.

Solicitors: *Doyle, Devonshire & Co., for Abberley & Walker, Burslem, Stoke-on-Trent.*

I. G. R. M.

---

[24] L.R. 20 Eq. 186.

C. A.

1953
July 8, 9, 10, 13, 14, 15, 16;
Oct. 16.

Evershed M.R., Birkett and Romer L.JJ.

R. J. REUTER CO. LD. *v.* MULHENS.

[1951 R. 2726.]

Trading with the Enemy—Custodian of Enemy Property—Power of sale—Sale of trade mark and goodwill—Whether intra vires—Trading with the Enemy Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 89), *ss.* 7, 16—*Trading with the Enemy* (*Custodian*) *Order,* 1939 (*S.R. & O.* 1939, *No.* 1198)—*Distribution of German Enemy Property Act,* 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 85)—*Distribution of German Enemy Property* (*No.* 1) *Order,* 1950 (*S.I.* 1950, *No.* 1642), *para.* 18 (1) (3).

Trade Mark — Assignment — Goodwill—Mark enemy owned—Assigned with goodwill in this country—Whether any common law rights left in enemy—Use of mark on envelopes sent from Germany—Infringement—Slander of title—Passing off—Injunction—Challenge in good faith—Practice—Trade Marks Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 22), *ss.* 2, 7, 8, 22.

The plaintiff company was an English company which before the outbreak of war in 1939 had imported and marketed in this country No. 4711 eau de cologne, which had been manufactured by a secret process for generations by the German firm of Mulhens. Mulhens also manufactured certain associated products in this country which the plaintiffs marketed as "4711" products. A large number of trade marks had been registered by Mulhens in this country relating to the eau de cologne and associated products incorporating in the mark "4711," with or without a scroll and bell device. The plaintiff company was controlled by the German firm of Mulhens and by an order of June 26, 1940, made by the Board of Trade under the Trading with the Enemy Act, 1939, the right to transfer the shares in the plaintiff company was vested in the Custodian of Enemy Property and the order gave to the custodian power to sell the shares. By a second order dated January 31, 1941, the Board of Trade vested the trade marks registered in Mulhens' name, together with their goodwill in the United Kingdom, in the custodian, but this order conferred no power of sale on the custodian. In October, 1941, the custodian was put on the register of trade marks as proprietor of the marks. Throughout the war years the plaintiff company continued to market and to manufacture eau de cologne and other products under the "4711" marks, using in part for such manufacture essences which had been acquired from Mulhens until the supply of such essences was exhausted. Thereafter the manufacture continued without the essences.

By order of April 17, 1951, the Board of Trade, under the powers conferred by the Act of 1939, purported to authorize the custodian to assign and transmit the "4711" marks in connexion with or without the goodwill of the Mulhens' business. Subsequently, the custodian, in exercise of his power under the first order, sold for approximately £300,000 the shares formerly owned by Mulhens in the plaintiff company to an English company, and on June 15, 1951, by deed, to which the Board of Trade was a party, assigned the "4711" marks to the plaintiff company.

The plaintiff company applied to be and was registered as owner of the marks on November 13, 1951, but, on the application for such registration, no advertisement of the application for registration pursuant to section 22 (7) of the Trade Marks Act, 1938, was directed by the registrar, who considered such advertisement to be unnecessary. On July 9, 1951, the state of war with Germany was declared to be at an end and the defendant, who was the owner of the firm of Mulhens, ceased to have enemy status.

In the autumn of 1951 the defendant wrote certain letters to persons in this country alleging that the German product was the genuine "4711" eau de cologne, and the envelopes used by the defendant to persons in this country bore the "4711" device, which was identical with one of the trade marks of which the plaintiff company had become the registered proprietors.

In these proceedings the plaintiff company sought an injunction to restrain the defendant from infringing their marks, and alleged that the defendant had slandered the plaintiff company or its business:—

Held, first (*per* Evershed M.R. and Birkett L.J.), that the opening words of section 7 of the Trading with the Enemy Act, 1939, which provide that, "With a view to preventing the payment "of money to enemies and of preserving enemy property in contem- "plation of arrangements to be made at the conclusion of peace," the Board of Trade should have the powers thereby conferred, did

C. A.

1953

R. J. Reuter Co. Ld. *v.* Mülhens.

not restrict the powers of the Board of Trade to preserving enemy property; that the Board of Trade had power under that Act to make the order of April 17, 1951, authorizing the custodian to assign the marks; and that the assignment of June 15, 1951, was not ultra vires the custodian.

Held, secondly (per curiam) that, in any event, by the Distribution of German Enemy Property Act, 1949, and the Distribution of German Enemy Property (No. 1) Order, 1950, it became the duty of the Board of Trade to realize the trade marks to the best advantage and the order and assignment were intra vires thereunder.

Held, thirdly, that the question what advertisement of an assignment of a mark should be made by the assignee under the provisions of section 22 (7) of the Trade Marks Act, 1938, was a matter for the registrar; and that, the plaintiff company having made their application in due form, the fact that the registrar did not direct any advertisement of the assignment of the mark did not enable the defendant to challenge the effectiveness of the assignment.

Held, fourthly, that the use by the defendant on envelopes sent to this country of the marks of which the plaintiff company was the registered proprietor constituted an infringement of the plaintiff company's rights under section 4 of the Act of 1938, and that the use of the number "4711" by the defendant was not protected as being within sections 7 or 8 (*a*) of the Act of 1938.

Held, fifthly, that the defendant could not invoke section 22 (4) of the Act of 1938. The vesting and assignment of the marks prima facie operated to confer on the plaintiff company all rights, whether statutory or at common law, to the use of the marks. Further, the vesting and assignment according to their terms operated to assign to the plaintiff company the goodwill in this country of the business concerned in the goods for which the trade marks were registered. The defendant was conducting no business in this country and he had no proprietary rights here which he was entitled to protect. He could not be said to have the "exclusive rights" in the marks contemplated by section 22 (4), because of the goodwill which he had in another country.

By virtue of section 22 (1) of the Act of 1938 a mark might be validly assigned by one manufacturer to another without any assignment of the business or goodwill of the assignor and so as thenceforth to be distinctive of a manufacturing origin different in fact from the previous manufacturing origin, so long as the mark was not deceptive.

The extent to which the principles laid down in *Lacteosote Ld.* v. *Alberman* [1927] 2 Ch. 117; 43 T.L.R. 336; 44 R.P.C. 211 had been altered or abrogated by section 22 of the Act of 1938 considered.

Held, sixthly, that (as was now admitted) the plaintiffs had no cause of action for trade slander, and, on the evidence, they had not established that the defendant intended to attack in the future the plaintiffs' products and they were accordingly not entitled to a declaration on this matter.

Per Romer L.J. The rights conferred at common law by reason of the use of the marks by Mulhens prior to 1939 formed part of the goodwill of their former business in this country and this goodwill constituted an asset which was capable of being and was vested in the custodian and validly assigned by him to the plaintiffs. In these circumstances, no common law rights remained in the defendant upon which he could base a claim under section 22 (4) of the Act of 1938.

Bank voor Handel en Scheepvaart N.V. v. *Slatford* [1953] 1 Q.B. 248; [1952] 2 T.L.R. 861; [1952] 2 All E.R. 956 considered.

Decision of Danckwerts J. (1953) 70 R.P.C. 102 affirmed.

Appeal from Danckwerts J.

In this action the plaintiff company, R. J. Reuter Co. Ld., claimed against the defendant, Ferdinand Mulhens, an injunction to restrain the defendant from infringing the plaintiffs' registered trade marks, and from representing that the plaintiffs' eau de cologne and perfumes sold under the trade mark "4711" were not genuine "4711" products or from alleging that the plaintiffs were not entitled to apply the trade mark "4711" to their products.

The following statement of facts is taken from the judgment of Evershed M.R.: The plaintiffs were an English company who were the registered proprietors of a number of trade marks relating to "4711" eau de cologne, and claimed to be rightly registered as such proprietors and to be entitled to all the goodwill belonging to the marks and to the business of making and marketing "4711" eau de cologne in England.

The defendant, who was an infant appearing by his mother as next friend, was the present owner of the business in Cologne, Germany, which was, and had for several generations been, associated with the manufacture in Germany and the sale in Germany and elsewhere (but not now in England) of "4711" eau de cologne; and he now challenged the plaintiff company's claims to proprietorship of the English trade marks and to the business in England of making and selling "4711" eau de cologne.

The total number of the English trade marks relating to "4711" eau de cologne and other associated products was over 50, but the present action was founded upon 11 only of them. For simplicity, it would suffice to describe one mark only, registered in Class 48 in respect of perfumery, being the mark well known to users of "4711" eau de cologne. It consisted of a blue and gold label on the bottles, having prominently in the middle the figure "4711" enclosed in what had been referred to as a "scroll" of simple character, but having a small bell depicted upon its right side. The so-called "scroll" appeared in fact to be an elaboration of the letters "No.," meaning "number." For the rest, the badge had at the top the words "Blue and gold," "Eau de Cologne" and "Double," and it contained representations of a number of medals symbolizing awards which the product had gained at European exhibitions. There was at the bottom of the badge a space adapted for a statement of the business origin of the product. In the case of the German product, there was in that space, inter alia, the name and address "Glockengasse No. 4711 Koln am Rhein"—the street name accounting for the origin of the bell upon the scroll. In the case of the English product the space was occupied by the plaintiff company's name and address.

The German business, to which the defendant had succeeded and which, until the events later stated, was exclusively associated both in Germany and elsewhere with the name or description of "4711" eau de cologne, was an old one, having been established in the second half of the eighteenth century. The use of the number "4711" arose out of the occupation of Cologne by the French armies about the year 1792. It then occurred to Napoleon I or his representatives to number all the houses in Cologne consecutively and without regard to streets. No. 4711 accordingly fell to the premises of the defendant's predecessor, who turned the circumstances to account by adopting the number as the distinguishing characteristic of his business and its products, calling the premises "Das Haus der Zahl." The large number of exhibits, including printed cards for dispatch by post to the German business in Cologne, established clearly that No. 4711 Koln am Rhein had become, without more, well recognized as a sufficient, and, indeed, the actual, address. The number "4711" in an appropriate context had become as distinctive of a particular place and of the business carried on thereat as, for example, "No. 10" in a wholly different context might be said to signify the official residence of the British Prime Minister.

Before the first world war the products of the German business (hereinafter sometimes referred to as "Mulhens") had achieved a great reputation inside Germany and elsewhere in Europe, but they were not sold in England directly or by agents. They were bought and imported into England by the firm of R. J. Reuter, who were given by Mulhens the sole right so to do. In 1914 the undertaking of the firm of R. J. Reuter was transferred to a limited company, the plaintiffs in this action. The name of the plaintiff company underwent more than one change before assuming its present form. The earlier inclusion in the name of the number "4711" was later omitted at the request of the defendant's then predecessor. There was no evidence as to what exactly were the arrangements, if any, made during the first world war in regard to the trade marks then registered in Mulhens' name or in regard to the carrying on or preservation of the business of selling "4711" eau de cologne in England. The court assumed that under the trade mark law, as it then was and as it remained till the Act of 1938, it would not have been possible to dispose of the marks, for example by a sale to an English buyer, separately and dissociated from the German business from which the goods had originated. In any case, after that war had ended, the previous business arrangements appeared to have been resumed, "4711" eau de cologne and associated products being bought and imported into England from Germany by the plaintiff company and sold by them in this country.

The first change in those previously existing arrangements occurred in the year 1930 on the death of Mr. R. J. Reuter himself. Ninety-five per cent. of the shares in the plaintiff company were at the date of Mr. Reuter's death held by him or members of his family. The whole of those shares were acquired by a Dutch company which was itself, albeit at one remove, wholly controlled by Mulhens. It thus came about that upon the outbreak of the second world war the plaintiff company became enemy-controlled within the meaning of the trading with the enemy legislation.

The next material change in the old business products and relationship occurred in or about the year 1931, and was the result of the fiscal problems then affecting most of the nations of the world. As a consequence, it became desirable that some part at least of the Mulhens' products should be manufactured here. To enable that to be done, and by arrangement between the plaintiff company and Mulhens, a manufacturing plant was established near the plaintiff company's place of business in Slough. Although most of the required personnel appeared to have been provided by the plaintiff company, the plant itself was, and was always treated as, the property of Mulhens. The amount of actual manufacturing done was, in fact, strictly limited. So far as the ordinary "4711" eau de cologne perfume was concerned—which had been called in this case "the classic eau "de cologne"—that was always wholly made and packaged in Germany and imported as theretofore by the plaintiff company for sale in this country; and the classic eau de cologne continued to constitute the greater part of the total of the "4711" products. But in the case of the subsidiary "4711" products, a substantial proportion of them was thenceforth manufactured in England, in the sense that the final process of distillation or dilution of the essential essences was carried out at Slough with spirit acquired for the purpose in England. It had, however, been made clear, and it was not disputed, that those essential essences were made up in Germany, or outside England, under direct German supervision, and imported here, and that the formulae and methods for the making of those essences had been, as they still were, closely guarded secrets. The method of production of those essences might be properly called a secret process, and the composition of the essences was known only at any one time to three persons—at the present time, to the aunt and grandmother of the defendant and one of the two general managers of the defendant's business, one Schutte, who personally undertook or supervised the blending, etc., of the essences under conditions of complete secrecy.

Such was the situation at the time of the outbreak of the second world war on September 3, 1939, Mulhens then becoming an enemy and the plaintiff company becoming enemy-controlled. There then were three distinct commercial entities: (1) Mulhens, owning all the trade marks, (2) the plaintiff company, who were contributing, however, little or nothing to the manufacture of the products and had no interest in the marks, and (3) the assembly plant at Slough belonging in fact to the plaintiff company, but occupied by or on behalf of Mulhens.

The business of the making-up and selling "4711" products continued to be carried on during the war years by the plaintiff company, who were able to acquire from Holland, before that country was invaded, a substantial supply of the essences sufficient to enable the products made therefrom as theretofore to be continuously marketed till as late as 1946. At some time also the plaintiff company began to make up on their own, and to market a perfume corresponding in appearance, at least, to the classic "4711" eau de cologne. Whether and to what extent the imported essences were used was not made clear, but it was certain that, for some time since and during the war, that English counterpart of the classic perfume, not derived from German essences, had been sold in England by the plaintiff company and those sales continued on a large scale. The volume of business in that so-called "4711" eau de cologne and other associated products had, on the plaintiff company's own statement, greatly increased both during and after the war by comparison with the plaintiff company's former sales of products made in Germany or from essences imported by the plaintiff company. It followed, therefore, that for some 14 years past bottles bearing the badge had been on sale in England, and that badge had been and was, on the face of it, indicative of an English origin, namely, the manufacture of the plaintiff company. On the other hand, it was also the fact that upon their letter headings the plaintiff company continued, at least until the autumn of 1950, to relate their products with the former German source by describing themselves as sole concessionaires for Great Britain for No. 4711, the famous house of eau de cologne.

The business carried on by the plaintiff company after the outbreak of war appeared at first to have been the result of some informal arrangement between the plaintiff company and the Board of Trade. Later, however, vesting orders were made in favour of the Custodian of Enemy Property by virtue of section 7 of the Trading with the Enemy Act, 1939. The first order, referred to by its number "238," was made on June 26, 1940, and related to the 35,186 shares in the plaintiff company then registered in the name of Mulhens' Dutch subsidiary. By the order the Board of Trade, in exercise of its statutory powers, thereby ordered: "(1) That the right to "transfer the said shares and to receive any dividends now due "and to accrue due thereon do vest in" the Custodian for England under the Trading with the Enemy Act, 1939. "(2) "That the said custodian is to be at liberty to transfer the shares "or any of them into his own name to be held by him as such "custodian and shall do so as and when requested by the Board "of Trade. (3) That the said custodian (whether the said shares "or any of them shall be transferred into his name or not) shall "sell all or any of the said shares as and when requested so to "do by the Board of Trade." The shares were, in fact, in due course registered in the custodian's name. It followed that from the date of that order all enemy taint affecting the plaintiff company was removed.

The second order, known as "238A," was not made until January 31, 1941. It related specifically to the trade marks, and by it the Board of Trade, in exercise of its statutory powers, ordered, so far as material, as follows: "(1) That the said trade "marks"—namely, the marks specified in the schedule and registered in Mulhens' name—"together with the goodwill (if "any) in the United Kingdom of the business concerned in the

" goods for which the trade marks are registered do vest in " the Custodian for England under the Trading with the Enemy Act. " (2) That the provisions of section 22 (7) of the Trade Marks " Act, 1938 "—relating to advertisements on sales of trade marks apart from goodwill—" shall not apply to the assignment of the " said trade marks affected by this order. (3) That the said " custodian do have power (*a*) to apply under section 25 of the " Trade Marks Act, 1938, for the registration of his title to the " said trade marks in the register of trade marks: (*b*) to apply " with R. J. Reuter Co. Ld. for the registration of R. J. Reuter " Co. Ld. as registered users of the said trade marks in " accordance with the provisions of section 28 of the Trade Marks " Act, 1938."

There was not in this order, as there was in the first order relating to the shares, any power for the custodian to sell or transfer to another any of the marks or the goodwill, if any, vested in him by the order. It was not in fact until October 15, 1941, that the custodian's name was put upon the register of trade marks in respect of all the marks vested in him by the order, and at the same time the plaintiff company was registered as registered users of the marks as contemplated by paragraph (3) of the order. The effect of that vesting order was that the custodian became the legal owner of the marks and of any other proprietary rights which the order had been apt to vest in him. In accordance with what must be taken as well established, the beneficial ownership of the marks became in statutory suspense: see the observations of Evershed M.R. in *Bank voor Handel en Scheepvaart N.V.* v. *Slatford*[1] in support of the proposition that the suspension of the beneficial ownership in the marks did not involve its extinction even during the war; and it was assumed that that proposition was correct.

The third and last order, known as " No. 238B," was made many years later, after the cessation of hostilities in the war, namely, on April 17, 1951. After reciting the second order, No. 238A, and the provisions of section 15 (5) of the Trading with the Enemy Act, 1939, to the effect that any power conferred by the Act to make orders should be construed as including powers exercisable in like manner to vary or revoke them, and after stating that it was deemed expedient that order No. 238A should be varied as thereafter appearing, the Board of Trade, in exercise of its statutory powers, ordered as follows: " That the said order "

---

[1] [1953] 1 Q.B. 248, 288; [1952] 2 T.L.R. 861; [1952] 2 All E.R. 956.

—namely, No. 238A—" is henceforth to be read and construed " as if the following article were included in the said order: " ' 3A. That the said custodian do have power to assign and " ' transmit the said trade marks either in connexion with the " ' goodwill of the business referred to in article 1 hereto or not.' " That order was no doubt made in contemplation of the two assignments which were executed in the following June. By the first of them, the custodian, in exercise of his powers under the first vesting order (No. 238), sold for a large sum of money (about £300,000) all the shares in the plaintiff company vested in the custodian to another English company, Scott & Bowne Ld. That company, which also later acquired the shares held by Mr. Cooper, the plaintiff company's manager, thus became, in effect, the proprietor of the plaintiff company's business. Since, however, the plaintiff company and their predecessors had for many years been exclusively concerned with the marketing of " 4711 " eau de cologne products, first as acquired by them from Germany or made up at the assembly plant in Slough, and since September, 1939, as manufactured by themselves, it was obvious that the value of the shares sold depended upon the plaintiff company continuing to have the right to manufacture and market, or at least to market, those goods under their well-established marks.

On June 15, 1951, by deed made between the Custodian of Enemy Property for England of the first part, the Board of Trade of the second part, and the plaintiff company of the third part, after reciting the vesting order No. 238A of January 31, 1941, as varied by the order No. 238B, and after further reciting that the Board of Trade had " directed the custodian to transfer " the trade marks with the goodwill (if any) " to the plaintiff company and that the plaintiff company, in consideration of such a transfer had agreed " to covenant with the Comptroller- " General of Patents, Designs and Trade Marks, acting as " registrar of trade marks, in manner " thereinafter appearing, it was witnessed as follows: " (1) In pursuance of the said direction " the custodian hereby assigns unto the assignee all the said " trade marks together with the goodwill (if any) in the United " Kingdom of the business concerned in the goods for which the " trade marks are registered. (2) The assignee in consideration " of the direction given by the Board of Trade to the custodian " as hereinbefore recited hereby for itself and its successors in " title covenants with the Board of Trade that it will not assign " the said trade marks and goodwill to nor allow them to come

C. A.
1953

R. J. REUTER Co. LD.
v.
MULHENS.

"into the ownership or control of any person firm or company "residing or carrying on business in Germany or any person "firm or company known or believed to be a nominee thereof and "further (for the more effectual enforcement of this covenant) to "ensure that on the occasion of any assignment during a period "of fifteen years from the date of these presents that the written "consent of the Board of Trade is first applied for and obtained "provided that in the case of an assignee who is otherwise suit-"able the Board of Trade shall not unreasonably withhold its "consent. (3) The parties hereto hereby certify that the trans-"action hereby effected does not form part of a larger transaction "or of a series of transactions in respect of which the amount "or value or the aggregate amount or value of the consideration "exceeds five hundred pounds."

Notwithstanding the terms of the second recital, the covenant made by the plaintiff company was made not with the Comptroller-General of Patents, etc., but with the Board of Trade. Nothing, however, turned on that circumstance.

Following upon the execution of the last-mentioned assignment, the plaintiff company in due course applied to have themselves registered as proprietors of the marks and they were so registered. Two matters of fact had, however, to be noted in regard to that application and registration. In the first place, since five of the marks contained on the face of them a reference to German origin, the assignment of those marks, if it was to be effective, would be plainly deceptive. Those marks were therefore withdrawn by the plaintiff company from their application and abandoned by them as marks. The circumstance was relied on by the defendant as illustrative of the continued connexion between the badges and the goods sold under the badges with the old manufacturing source in Cologne. The second matter of fact was that no advertisement of the application for registration was directed by the registrar under section 22 (7) of the Trade Marks Act, 1938, the form of application being in fact adjusted, at the suggestion of the registrar, in order to make it unnecessary.

The date of the actual registration of the plaintiff company as proprietors of the marks was November 13, 1951; but it was conceded that the plaintiff company's title as proprietors dated back to June 15, 1951, being the date of the assignment to them.

On July 9, 1951, His Majesty, by Order in Council, declared that the state of war with Germany had ended, and Mulhens thereupon ceased to have enemy status. He became once again able to litigate in the English courts any rights that he had which were subject to the jurisdiction of those courts. The defendant had, however, not attempted to trade in this country in eau de cologne and his counsel stated (for it was fundamental to one of their points under the Trade Marks Act, 1938), that he had no present intention of so doing.

In the months of August, September and October, 1951, occurred the events which had given rise to the present proceedings.

The first event arose out of an issue of " Vogue " newspaper in July, 1951, and the juxtaposition in that paper of an advertisement by the plaintiff company and of an article by a Mrs. Forbes relating to a visit by her to Frankfurt in Germany and the purchase by her there of a bottle of German " 4711 " eau de cologne. The defendant or his solicitors thereupon wrote letters in the months of August, September and October to the editor of " Vogue " and to Mrs. Forbes complaining of that juxtaposition in " Vogue " and alleging that it would be bound to cause confusion between the defendant's products and those of the plaintiff company. In the course of that correspondence the defendant or his advisers referred to the product of the German business as " the genuine original ' 4711 ' eau de cologne " and to the plaintiff company's produce as " the non-genuine product."

The second incident was a letter dated October 23, 1951, addressed to Lyall, Willis & Co. Ld., who had been and were the export agents of the plaintiff company, complaining principally of an advertisement issued by a customer of Lyall, Willis & Co. Ld. in Eritrea relating to the plaintiff company's products. In the course of that letter the defendant again referred to his own product as " the genuine and original eau de cologne " and accused the plaintiff company of passing off their goods as and for the goods of the defendant. That letter was enclosed in an envelope, the left hand side of which was largely occupied by the legend, " The original house of genuine ' 4711 ' eau de cologne, " Koln am Rhein." The figure " 4711 " was represented against a dark green background surmounted by a scroll and bell device in all respects identical with that forming part of the trade marks in suit. It was admitted at the trial that that envelope was of a kind which had been used substantially for the purpose of sending business communications to persons in England.

As a result of those incidents the plaintiff company issued the writ in this action claiming:—(1) an injunction to restrain the defendant from infringing the plaintiff company's registered trade marks; (2) an injunction to restrain the defendant from representing that the eau de cologne and perfumery sold under the

C. A.

1953

R. J. REUTER Co. LD. v. MULHENS.

"4711" trade marks were not genuine "4711" products; (3) a declaration that the only genuine "4711" eau de cologne and perfumery were the plaintiffs' and that the defendant was not entitled to use the plaintiff company's trade marks in relation to any eau de cologne or perfumery in this country.

The defendant, in his defence, alleged that the order and assignment vesting the "4711" trade marks in the plaintiff company were ultra vires the powers conferred on the Board of Trade by the Trading with the Enemy Act, 1939.[2] The defendant further alleged that the assignment of the trade mark to the plaintiff company was ineffective by reason of non-compliance with the requirements of section 22 (7) of the Trade Marks Act, 1938.[3]

---

[2] Trading with the Enemy Act, 1939, s. 7: "(1) With a view to preventing the payment of money to "enemies and of preserving enemy "property in contemplation of arrange-"ments to be made at the conclusion "of peace, the Board of Trade may "appoint custodians of enemy pro-"perty for England . . . and may by "order—(*a*) require the payment to "the prescribed custodian of money "which would, but for the existence "of a state of war, be payable to or "for the benefit of a person who is "an enemy . . . ; (*b*) vest in the "prescribed custodian such enemy "property as may be prescribed, or "provide for, and regulate, the vest-"ing in that custodian of such enemy "property as may be prescribed; "(*c*) vest in the prescribed custodian "the right to transfer such other "enemy property as may be pre-"scribed, being enemy property which "has not been, and is not required "by the order to be, vested in the "custodian; (*d*) confer and impose "on the custodians and on any other "person such rights, powers, duties "and liabilities as may be prescribed "as respects—(i) property which has "been, or is required to be, vested in "a custodian by or under the order, "(ii) property of which the right of "transfer has been, or is required to "be, so vested, (iii) any other enemy "property which has not been, and "is not required to be, so vested, or "(iv) money which has been, or is by "the order required to be, paid to a "custodian. . . . (4) Any order under "this section shall have effect not-"withstanding anything in any Act "passed before this Act."

S. 15: "(5) Any power conferred "by the preceding provisions of this "Act to make an Order in Council "or an order shall be construed as "including a power, exercisable in "the like manner, to vary or revoke "the Order in Council or order."

[3] Trade Marks Act, 1938, s. 2: "No person shall be entitled to insti-"tute any proceedings to prevent, or "to recover damages for, the infringe-"ment of an unregistered trade mark, "but nothing in this Act shall be "deemed to affect rights of action "against any person for passing off "goods as the goods of another person "or the remedies in respect thereof."

S. 4: "(1) Subject to the provisions "of this section, and of sections 7 "and 8 of this Act, the registration ". . . of a person in Part A of the "register as proprietor of a trade "mark . . . in respect of any goods "shall, if valid, give or be deemed "to have given to that person the "exclusive right to the use of the "trade mark in relation to those goods "and, without prejudice to the gener-"ality of the foregoing words, that "right shall be deemed to be infringed "by any person who, not being the "proprietor of the trade mark or a "registered user thereof using by "way of the permitted use, uses a "mark identical with it or so nearly "resembling it as to be likely to

The defendant counterclaimed for declarations:—(a) that the order of the Board of Trade authorizing the assignment of the

"deceive or cause confusion, in the course of trade. . . ."

S. 7: "Nothing in this Act shall entitle the proprietor or a registered user of a registered trade mark to interfere with or restrain the use by any person of a trade mark identical with or nearly resembling it in relation to goods in relation to which that person or a predecessor in title of his has continuously used that trade mark from a date anterior—(*a*) to the use of the first-mentioned trade mark in relation to those goods by the proprietor or a predecessor in title of his; or (*b*) to the registration of the first-mentioned trade mark in respect of those goods in the name of the proprietor or a predecessor in title of his; whichever is the earlier, or to object (on such use being proved) to that person being put on the register for that identical or nearly resembling trade mark in respect of those goods under subsection (2) of section 12 of this Act."

S. 8: "No registration of a trade mark shall interfere with—(*a*) any bona fide use by a person of his own name or of the name of his place of business, or of the name, or of the name of the place of business, of any of his predecessors in business; or (*b*) the use by any person of any bona fide description of the character or quality of his goods, not being a description that would be likely to be taken as importing any such reference as is mentioned in paragraph (*b*) of subsection (1) of section 4, or in paragraph (*b*) of subsection (3) of section 37, of this Act."

S. 22: "(1) Notwithstanding any rule of law or equity to the contrary, a registered trade mark shall be, and shall be deemed always to have been, assignable and transmissible either in connexion with the goodwill of a business or not.

"(2) A registered trade mark shall be, and shall be deemed always to have been, assignable and transmissible in respect either of all the goods in respect of which it is registered, or was registered, as the case may be, or of some (but not all) of those goods."

"(4) Notwithstanding anything in the foregoing subsections, a trade mark shall not be, or be deemed to have been, assignable or transmissible in a case in which as a result of an assignment or transmission there would in the circumstances subsist, or have subsisted, whether under the common law or by registration, exclusive rights in more than one of the persons concerned to the use, in relation to the same goods or description of goods, of trade marks nearly resembling each other or of identical trade marks, if, having regard to the similarity of the goods and of the trade marks, the use of the trade marks in exercise of those rights would be, or have been, likely to deceive or cause confusion: Provided that, where a trade mark is, or has been, assigned or transmitted in such a case as aforesaid, the assignment or transmission shall not be deemed to be, or to have been, invalid under this subsection if the exclusive rights subsisting as a result thereof in the persons concerned respectively are, or were, having regard to limitations imposed thereon, such as not to be exercisable by two or more of those persons in relation to goods to be sold, or otherwise traded in, within the United Kingdom (otherwise than for export therefrom) or in relation to goods to be exported to the same market outside the United Kingdom."

"(7) Where an assignment in respect of any goods of a trade mark that is at the time of the assignment used in a business in those goods is made, on or after the appointed day, otherwise than in connexion with the goodwill of that business, the assignment shall not take effect until the following requirements have been satisfied, that is to say, the assignee must, not later than mark was ultra vires; (b) that the purported assignment of the marks to the plaintiff company by the Custodian of Enemy Property was void; (c) that the plaintiff company were wrongly registered as proprietors of the trade mark, and he asked for rectification of the register.

Danckwerts J. held that the plaintiff company had succeeded in respect of their claim to the marks, and in respect of their claim that the defendant had infringed the marks, but he held that the defendant had not acted maliciously, and granted an injunction to restrain further infringement of the marks.

The defendant appealed and the plaintiff company cross-appealed.

James Mould Q.C., *R. G. Lloyd* and *D. S. Paul* for the defendant. The vesting order 238B made by the Board of Trade was in excess of the powers conferred by the Trading with the Enemy Act, 1939, for it was not required for any of the purposes for which orders could be made by the Board of Trade under section 7. Therefore the assignment of June 15, 1951, was ultra vires both the custodian and the Board of Trade. The opening words of section 7 limit the scope of the powers conferred to measures which are both directed to preventing the payment of money to enemies and also to preserving enemy property in contemplation of arrangements to be made at the conclusion of peace: *Bank voor Handel en Scheepvaart N.V.* v. *Slatford.*[4] That second consideration limits the scope of the first and, consequently, although the original vesting in the custodian of the marks and other property of the defendant was, no doubt, valid, that exhausted the powers of the Board of Trade under that section, for the vesting in the custodian had made it impossible for the defendant to alienate his rights or to deal with them in any way and so ensured that the beneficial interest would be kept in suspense until the end of the war. The assignment to the plaintiffs was not necessary to preserve the rights of the original owners, for this was not perishable property which might have to be sold in order that something might be available for the original owner on the conclusion of peace. Not only was a sale unnecessary, but the custodian did not even sell the rights—he

---

"the expiration of six months from "the date on which the assignment "is made or within such extended "period, if any, as the registrar may "allow, apply to him for directions "with respect to the advertisement of "the assignment, and must advertise "it in such form and manner and "within such period as the registrar "may direct."

[4] [1953] 1 Q.B. 248; [1952] 2 T.L.R. 861; [1952] 2 All E.R. 956.

gave them away for no consideration. The assignment was in fact a confiscation of the defendant's rights, and there is well-established authority (*Daimler Co. Ld.* v. *Continental Tyre and Rubber Co.* (*Great Britain*) *Ld.*[5]) for saying that it has never been the policy of the English law to confiscate the property of enemy aliens during war-time but merely to suspend their rights. Here, on the face of the assignment, there was no consideration for the assignment and the onus is on the plaintiffs to prove consideration. The order and the assignment made in pursuance of it went beyond the powers conferred by the Act, and the plaintiffs should be struck off the register, leaving the custodian to deal with the rights of the defendant in accordance with arrangements which have yet to be made.

The assignment was ineffective also by virtue of the Trade Marks Act, 1938. The plaintiffs have not complied with the requirements of section 22 (7) of the Act as to advertisements; they have not, therefore, been registered properly and the action abates since they have no right of action. The envelopes used by the defendant did not amount to an infringement under section 4 for they were not used in the course of any trade or business transaction and were merely advertising matter. Further, the use of the insignia on the envelopes was protected by section 8, for it was a bona fide use by the defendant of his name or place of business, and, though the name of the defendant or his address may not be the ordinary or natural use, it may, nevertheless, be a bona fide use, and that was so here.

If, which is not accepted, the transfer of the marks and the registration of the plaintiffs was effective, it amounted to a forfeiture or confiscation of the defendant's rights so as to constitute a fresh root of title in the plaintiff company upon registration dissociated from previous proprietorship. Therefore the defendant was protected in using the mark by section 7 of the Trade Marks Act, 1938, as he, and his predecessors in title, had used the mark from a date anterior to the use of those marks by the plaintiff company or by their predecessors in title or to the registration of the marks in the plaintiff company's name, and the defendant had not ceased to use the marks continuously by reason of his disability due to the war and his enemy status. "Proprietor" in paragraph (*a*) of section 7 means "beneficial proprietor," as distinguished from the registered proprietor or legal owner.

The assignment which was purported to be effected by the document of June 15, 1951, was of a kind which, in the circumstances, was expressly forbidden by section 22 (4) of the Trade Marks Act, 1938. It is no defence to an action for passing off for a defendant to show that he has been registered as the proprietor of the trade marks if the use of those marks will in fact cause his goods to be passed off as those of the plaintiff: *Reddaway & Co. Ld.* v. *Irwell and Eastern Rubber Co. Ld.*[6] There it was assumed that registration was no defence: see also *Mitchell* v. *Henry*[7] and *Reddaway* v. *Banham.*[8] Registration will not exclude the exclusive right of the trader at common law to exclude all others from the use of the badge indicating his goods. By registration the proprietor obtains by section 4 (1) of the Act of 1938 a statutory right to exclude others from using the marks, provided always that the registration is valid, but the statutory right will not prevail against the common law right. If two persons have both secured registration of the same right, one by virtue of an original registration and the other by virtue of an assignment, the assignee will not succeed in defending himself in an action for infringement brought by the other; similarly, where two persons both claim exclusive rights, one relying on registration secured by an assignment and the other on common law rights, the registration will be bad and the "registered proprietor" will be liable for infringement.

---

[5] [1916] 2 A.C. 307, 347; 32 T.L.R. 624.

The Act of 1938 enabled registered trade marks to be assigned for the first time without the goodwill attaching to the mark, but such an assignment is ineffective if the result would be to produce competing and conflicting statutory and common law rights. In the circumstances of this case, the common law rights were only suspended until the conclusion of peace; it was, therefore, impossible to assign effectively to the English company the exclusive right to use the marks, for Mulhens established that goodwill attributable to the original manufacture still attached to the marks and that purchasers of the goods bearing those marks would still believe that they were getting goods of German origin manufactured according to the secret formulae. Even if the plaintiff company had been able to manufacture exactly the same product as that formerly manufactured by Mulhens using their secret formulae and, further, even if purchasers were not aware of the original source of the manufacture, the assignment would still be ineffective as resulting in a passing off—see *Birmingham*

[6] (1907) 24 R.P.C. 203.
[7] (1880) 15 Ch.D. 181, 189.
[8] (1896) 13 R.P.C. 218, 224.

Vinegar Brewery Co. Ld. v. *Powell*[9] and *Rey* v. *Lecouturier*[10]—and the closer the imitation the greater are the chances of passing off. Danckwerts J. found that confusion would in fact be inevitable between the products of the plaintiff company and those produced by Mulhens, and, if Mulhens had voluntarily assigned the goodwill to the plaintiff company, they would not have been able to restrain their assignees from using the marks. A voluntary sale of the goodwill may for a time cause some unavoidable deception of the public and, as the vendor expressly sells to the purchaser the right to use the mark as indicating goods of his own manufacture, he cannot exercise his common law rights against the purchaser. But that is not so with an involuntary assignment. Here the German company can still go on marketing the goods, and they have given no implied covenant that they will not assert their rights. Even a voluntary assignment by Mulhens of the right to use the marks in the United Kingdom with the goodwill attached to that use would not carry with it the manufacturer's goodwill which attached to the German product. The custodian could not sell the right to carry on the business of the German firm and the manufacturer's goodwill, because that business and manufacture were outside his jurisdiction. The origin of the manufacture was the distinguishing characteristic which was protected by the marks; it was attributable to the use of the secret essences manufactured wholly in Germany. Consequently the custodian never had any right to the goodwill and could not assign it: see *Lacteosote Ld.* v. *Alberman.*[11] *Nordisk Insulinlaboratorium* v. *Gorgate Products Ld.* (*sued as C. L. Bencard* (*1934*) *Ld.*)[12] is not relevant here, for that was not a trade mark case.

If the defendant succeeds on any of the issues raised, he will have a good defence to all the claims made by the plaintiffs. These proceedings cannot revest the marks in the defendant. Their result, however, may be to revest the marks in the Custodian of Enemy Property. So long as the plaintiff company is on the register as the owner of the marks, the defendant cannot use the marks in this country. It is submitted that the custodian had no power to transfer the marks to the plaintiff company: first, because the transfer was not authorized by section 22 (4) of the Trade Marks Act, 1938; secondly, because the assignment of 1951 was not made for any consideration. The assignment was, in fact, a gift, and therefore the transaction was not one within the preamble to section 7 of the Act of 1939. Part of the consideration paid by the company purchasing the shares of the plaintiff company cannot be deemed to be appropriated to the transfer of the marks to the plaintiff company.

---

[9] [1897] A.C. 710.

[10] (1910) 27 R.P.C. 268; 27 T.L.R. 268.

[11] [1927] 2 Ch. 117; 43 T.L.R. 336; 44 R.P.C. 211.

[12] [1953] Ch. 430; [1953] 1 All E.R. 986.

The defendant contends that section 7 of the Act of 1938 applies here. In relation to the marks the defendant was the predecessor in title of the custodian and therefore of the plaintiff company. The marks have been continuously used in connexion with the defendant's goods. Until 1946 the plaintiff company's products incorporated the defendant's essences. The fact that the mark has not been used in this country in respect of the defendant's goods from 1946 onwards does not show abandonment: *Mouson & Co.* v. *Boehm.*[13]

R. G. Lloyd following. The evidence establishes that the use of the number "4711" with the scroll and bell device by the defendant was a bona fide use by him of the name of his place of business and such user is protected by section 8 (*a*) of the Act of 1938. Further, the evidence also establishes that most members of the British public seeing a bottle bearing the "4711" label expect it to contain the defendant's product. The use of the marks by the plaintiff company is liable to cause confusion and the provisions of section 22 (4) of the Act of 1938 apply and the mark is accordingly not assignable.

Lastly, on the facts, the use of the mark by the defendant on the envelopes was not a case of a use of a trade mark in the course of trade in the United Kingdom so as to be within the definition of trade mark in section 68 (1) of the Act of 1938. The user complained of must be in relation to marketing in the United Kingdom. The defendant's user accordingly was not an infringement within section 4 (1). [Reference was made to *Aristoc Ld.* v. *Rysta Ld.*[14]]

G. W. Tookey Q.C. and *Guy Aldous* for the plaintiff company. The first submission is that the assignment of the marks was within the powers conferred by section 7 of the Trading with the Enemy Act, 1939, on the Board of Trade. The validity of the first order vesting the shares in the custodian is not challenged, but the assignment of the marks is. The Act of 1939 conferred a complete discretion on the Board of Trade as to the powers which it might confer on a Custodian of Enemy Property. The opening words, which refer to "preserving enemy property in

---

[13] (1884) 26 Ch.D. 398.

[14] [1945] A.C. 68; 61 T.L.R. 121; [1945] 1 All E.R. 343.

"contemplation of arrangements to be made at the conclusion "of peace," do not mean that the Board of Trade must deal with enemy property on the footing that the enemy will receive it, or its proceeds, back. No one is the beneficial owner of the property during the war. The beneficial ownership is in suspense. The defendant could not have questioned the way in which the Board of Trade exercised its discretion during the war. Once it is conceded that the language of the Act authorizes the sale of enemy property, no one is entitled to come to the court and complain that property has been sold and not preserved unsold. The preamble to the Trading with the Enemy (Amendment) Act, 1914, which states the purpose of the Act, has been inserted in section 7 of the Act of 1939. The Act of 1939 proceeds on the assumption that it confers power on the Board of Trade to direct a sale of enemy property. That power was never questioned in *Bank voor Handel en Scheepvaart N.V.* v. *Slatford.*[15] It is, however, clear that after the passing of the Distribution of German Enemy Property Act, 1949, property formerly owned by German nationals would not be returned to them but would be sold and the proceeds applied in paying debts. After that Act was passed, it became the duty of the Board of Trade to realize German enemy property. Ormerod J. was right in holding in *Vamvakas* v. *Custodian of Enemy Property*[16] that the custodian had power to sell enemy property.

A very large sum was paid by the purchaser of the shares of the plaintiff company. The assignment of the trade marks was properly stamped 10s. only. The certificate that the consideration for the transfer did not exceed £500 was rightly given, since the transaction was not between the same parties as the sale of the shares: *Attorney-General* v. *Cohen.*[17] For a transaction to be part of a larger transaction it must be between the same parties. The consideration paid for the shares covers the transfer of the marks. The onus is on the defendant to establish that the order of the Board of Trade was ultra vires, and he has not discharged it.

With regard to the defendant's contentions on section 22 of the Trade Marks Act, 1938: before the passing of that Act a trade mark could not be assigned without goodwill. It has been suggested that the provisions of subsection (1) only relate to registered trade marks. The power of assignment conferred

---

[15] [1953] 1 Q.B. 248; [1952] 2 T.L.R. 861; [1952] 2 All E.R. 956.

[16] [1952] 2 Q.B. 183; [1952] 1 T.L.R. 638; [1952] 1 All E.R. 629.

[17] [1937] 1 K.B. 478; 53 T.L.R. 214; [1937] 1 All E.R. 27.

C. A.
1953

R. J. REUTER Co. LD.
v.
MULHENS.

includes unregistered trade marks. Subsection (4) contains a safeguard to prevent the ownership of a trade mark being split. The assignment of 1951 operated to vest in the plaintiff company all the defendant's rights in these trade marks both at common law and by statute. Common law rights in a mark may as a legal conception exist separately from the statutory rights, but they cannot be exercised separately: *In re John Sinclair Ld.'s Trade Mark.*[18] The plaintiff company is in the same position as if the marks had been assigned to them by the defendant. A trade mark is registered without any common law rights: *Mitchell* v. *Henry.*[19] The effect of section 22 of the Act of 1938 has been to abrogate the observation of Clauson J. in *Lacteosote Ld.* v. *Alberman.*[20]

The defendant contends that the goodwill of a business is not severable. That is wrong. The defendant's goodwill in this country was assigned to the plaintiff company. Apart from such assignment, the defendant has no goodwill left in this country. The *Cranbux* case[21] shows that goodwill in this country can be assigned. Whatever rights the defendant had in this country vested in the custodian.

With regard to subsection (7) of section 22: in fact there was no failure to comply with the requirements of this subsection as to advertisement, for the provisions of the subsection did not apply.

With regard to the plaintiff company's cross-appeal: a slander of the plaintiffs' title to the marks has been established. The plaintiff company is entitled to the relief which it claims.

Guy Aldous following. The point that the assignment of the mark was expressed to be made without consideration was not taken below. If it had been, the plaintiff company could have shown that there was consideration for the assignment. [Reference was made to *Halsey* v. *Brotherhood*[22] and *Samuelson* v. *Producers' Distributing Co. Ld.*[23]]

James Mould Q.C. replied.

J. P. Ashworth for the Board of Trade as amicus curiae. The point which the defendant has raised with regard to section 7 of the Act of 1939 has never been raised before. It is submitted that the opening words of the section are declaratory of Parliament's intention. The words " with a view to preventing " must be contrasted with the language used when powers are conferred by a statute: see, for example, the wording of section 43 of the Town and Country Planning Act, 1947, considered in *Earl Fitzwilliam's Wentworth Estates Co.* v. *Minister of Housing and Local Government.*[24] The opening words of section 7 do not restrict the powers conferred by the Act on the Board of Trade. It was within the statutory powers of the Board to authorize the sale of the marks. [*In re Münster (Enemy)* [25] was referred to.]

---

[18] [1932] 1 Ch. 598, 620.

[19] 15 Ch.D. 181.

[20] [1927] 2 Ch. 117; 43 T.L.R. 336, 44 R.P.C. 211.

[21] [1928] Ch. 829; 44 T.L.R. 409; 45 R.P.C. 281.

[22] (1880) 15 Ch.D. 514, 520; 19 Ch.D. 386.

[23] [1932] 1 Ch. 201; 48 R.P.C. 580.

October 16. The following judgments were read.

EVERSHED M.R. This appeal and cross-appeal have raised a number of questions, some of them under the trading with the enemy legislation of 1939, and some under the Trade Marks Act, 1938, relating to a perfume which has been well known in this country for very many years as "4711" eau de cologne. [His Lordship stated the facts and, after referring to the defendant's letters which caused the plaintiff company to start the action, continued:] These incidents may be regarded, as Danckwerts J. regarded them, as of a somewhat trivial character, but they set fire to the train of litigation that has since ensued. On December 3, 1951, the plaintiff company issued their writ against the defendant claiming that the envelope constituted an infringement of the plaintiff company's trade marks, and that the letters constituted a trade slander upon the plaintiff company's business and their goods; and they sought declarations, injunctions and other relief accordingly.

The answer of the defendant in his defence and counterclaim, in addition to containing a denial of the plaintiff company's allegations, challenged the validity of the plaintiff company's claims to sue as registered proprietors of the trade marks in question. This challenge was based upon submissions in part made in reference to the trading with the enemy legislation, and in part under the Trade Marks Act, 1938. It was, and is, the claim of the defendant, while not contesting the validity of the vesting order, No. 238A, that the later order, No. 238B, was made by the Board of Trade in excess of their powers under the Trading with the Enemy Act, 1939, as not being fairly required for any of the purposes for which, as the defendant says, orders might be made by the Board of Trade under section 7 of that Act. The defendant further claimed and claims that, in the event, the assignment of June 15, 1951, was ultra vires the custodian and the Board of Trade as being similarly in excess of any powers conferred upon, or capable of being conferred upon, them by the Trading with the Enemy Act, 1939, particularly since it amounted, on the face of it, to a giving away or relinquishment of the marks and any interests connected therewith formerly belonging to Mulhens, and later vested in the custodian under the trading with the enemy legislation.

---

[24] [1952] A.C. 362; [1952] 1 T.L.R. 521; [1952] 1 All E.R. 509.

[25] [1920] 1 Ch. 268.

It is to be observed that if these contentions, or either of them, were well founded, the result would, from the defendant's point of view, be of a somewhat qualified character, for, though the plaintiff company's cause of action would have been successfully challenged, the result would be merely to revest the marks and other property transferred by the assignment in the Custodian of Enemy Property.

Under the Trade Marks Act, 1938, the defendant contended: (1) that the assignment to the plaintiff company, and their entry in the register as proprietors of the marks, was ineffective by reason of non-compliance with the terms as to advertisement of section 22 (7) of the Act; (2) that in any case the envelope used by the defendant did not amount to an infringement under section 4, as not having been used in the course of any trade or business transaction in England, and, further, was protected by section 8, as constituting a bona fide use by the defendant of his name or the name of his place of business; (3) that the defendant's use of the mark or insignia, if otherwise liable to constitute an infringement of the plaintiff company's rights, was protected by section 7, as being a use by the defendant of a mark which he and his predecessors in title had continuously used from a date anterior to the use of their marks by the plaintiff company, or their predecessors in title, or to the registration of those marks in the plaintiff company's name. As Mr. Mould explained, this contention rested on the proposition that the transfer to, and registration of, the plaintiff company, if otherwise effective, amounted to a forfeiture or confiscation of the defendant's pre-existing rights in the trade marks, so as to constitute a fresh root of title in the plaintiff company upon registration dissociated from any previous proprietorship. (4) More important, however, than any of these contentions has been the point taken by the defendant under section 22 (4), a point which has seemed to me by far the most difficult question raised in the case. Under that subsection the defendant claims that the assignment to the plaintiff company, and their registration as proprietors of the trade marks, were void on the ground that the marks were incapable of being validly assigned to them and, accordingly, that the defendant, being entitled at common law to the use of the mark or badge which I have above described, is entitled to rectification of the register and also to restrain the plaintiff company from making any use of the badge themselves, as constituting a passing-off of their goods as and for the goods of the defendant. It will be seen that, if this contention is well founded, the defendant will achieve a much more far-reaching result than would flow from a mere revesting of the marks in the Custodian of Enemy Property.

These, then, are the issues raised, and upon them the judge found substantially in the plaintiff company's favour. He held that the plaintiff company was entitled to remain on the register as proprietors of the marks in question, and that the use by the defendant of envelopes of the kind I have described constituted an infringement of the plaintiff company's rights as registered proprietors of the marks. He rejected, accordingly, all the defendant's submissions based both on the trading with the enemy legislation and the Trade Marks Act, 1938, and dismissed his counterclaim. On the other hand, Danckwerts J. held that the defendant had not slandered the plaintiff company's business or its goods, and he therefore rejected so much of the plaintiff company's claim as related to slander of title. Against that judgment and order the defendant has appealed to this court, and the plaintiff company have served a notice of cross-appeal against the judge's rejection of their claim in respect of slander of title.

Upon this last matter, the plaintiff company did not, before us, contend that the judge should have found that they had established a good cause of action for trade slander, but have suggested that the assertion in the letters I have quoted, which was substantially repeated by Schutte in the witness-box, amounted to a sufficient threat to justify the court, in its discretion, making some form of declaration under R.S.C. Ord. 25, r. 5. It will be convenient to deal with this matter at once, since I can deal with it briefly, notwithstanding that any claim which the plaintiff company may have under this head presupposes their substantial success on the other matters raised in the proceedings. It forms a subject-matter wholly distinct from the many issues under the trading with the enemy and trade marks legislation.

Mr. Tookey and Mr. Aldous did not challenge the correctness of the judge's statement of the law as to trade slander, taken from Lord Davey's speech in *Royal Baking Powder Co.* v. *Wright, Crossley & Co.*,[1] namely: "To support such an action it is necessary for the plaintiffs to prove (1) that the statements complained "of were untrue; (2) that they were made maliciously, that is to "say, without just cause or excuse; (3) that the plaintiffs have "suffered special damage thereby." The judge expressed the opinion that, if the first two requirements could be found satisfied, the plaintiff company would be entitled to an injunction; but he found against the plaintiff company on both the first two requirements. He was satisfied that there was no evidence of malice, and he construed the references in the letters to the plaintiff company's goods as "non-genuine" as being substantially true, that is, as implying in their context no more than that these products were not made from the German essences and in accordance with the secret formulae in the possession of Mulhens, and were, therefore, of a different quality from that of the Mulhens products, and not as involving that the plaintiff company's goods were spurious in any opprobrious sense.

Mr. Tookey and Mr. Aldous have not felt able to contend that we should differ from Danckwerts J. in his conclusion on malice, nor have they seriously pressed us to take a different view of the construction of the letters. But they have drawn particular attention to the answers of Schutte in the witness-box under cross-examination at the trial, and particularly in his statement that he claimed "the right to say here in London, too, that we "are producing the only genuine '4711' eau de cologne." Mr. Aldous asked us, accordingly, to conclude from that answer, in addition to the terms of the letters. that the defendant intended, whatever the result of the present action, to persist in attacking the genuineness of the plaintiff company's products, and that the court accordingly ought to make an appropriate declaration in accordance with its powers under Ord. 25, r. 5, and give liberty to the plaintiff company to apply for an injunction.

Mr. Aldous referred us to the judgment of Romer L.J. in *Samuelson* v. *Producers' Distributing Co. Ld.*[2] as authority for the proposition, which cannot now be doubted, that where a plaintiff has applied to the court in reasonable apprehension, which he has established by evidence, of infringement of his rights (in the case cited by piracy of a sketch for the stage) but, before actual infringement has occurred, he may claim protection by the grant of liberty to apply for an injunction. Nor do I doubt the power of

[1] (1900) 18 R.P.C. 95, 99.

[2] [1932] 1 Ch. 201; 48 R.P.C. 580.

the court to make a declaration as to the plaintiff's title in an action for slander of title or goods, even though such slander has not been proved, where the court may think it appropriate to state, in the form of a declaration, its conclusion upon the title of the plaintiff which the defendant has in good faith challenged and continues to challenge.

The recent case before Harman J. of *Loudon* v. *Ryder* (*No.* 2),[3] to which our attention was called by Mr. Aldous after the conclusion of the argument, is an instance of the exercise of such a power. But I am satisfied that the present is not a case in which the power should be exercised. I have already expressed my concurrence with the view of Danckwerts J. upon the meaning of the letters of which the plaintiff company have complained, and I do not think that the answer of Schutte, any more than the arguments of the defendant's counsel in court, can justify the suggestion of a threat by the defendant, regardless of the result of the present proceedings, to slander the plaintiff company's business or goods. Nor, indeed, am I at all clear what is the form of the declaration which, according to the plaintiff company, the court should make. In my judgment, therefore, and without the necessity of making any further reference to the facts relied upon by the plaintiff company, there is no ground shown for reversing or varying the conclusion of Danckwerts J. upon this part of the plaintiff company's case, assuming that in other respects the plaintiff company is entitled to succeed. It follows, therefore, that the cross-appeal must in any case fail.

I turn now to the appeal, and first to the submissions of the defendant upon the Trading with the Enemy Act, 1939. I have already stated that the defendant, if right upon either or both of his submissions under this Act, would obtain only a qualified respite, since success on his part could do no more than revest the trade marks and any goodwill or other proprietary rights in the Custodian of Enemy Property, who could, and presumably would, then proceed to deal anew with them in a manner unlikely to benefit the defendant. Still, such success would suffice to defeat altogether the plaintiff company's right to sue in the present action.

It was made plain by Mr. Tookey that he did not seek to invoke any powers other than those conferred by the Trading with the Enemy Act, 1939, itself; for example, he did not rely upon anything in the Emergency Powers (Defence) Act, 1939, and orders made thereunder; and, though reference was made in the vesting orders to the Trading with the Enemy (Custodian) Order, 1939 (S.R. & O. 1939, No. 1198), it is plain that, if the powers of the Board of Trade conferred by the Act were limited in the manner and to the extent that the defendant alleges, these powers could not have been effectively extended by a general order made by the Board of Trade itself under the powers which fall to be construed. The question, then, turns exclusively on the true interpretation of the terms of the Act, and more particularly of the opening words of section 7 thereof.

---

[3] [1953] Ch. 423; [1953] 2 W.L.R. 863.

[His Lordship read section 7 (1) and (4) and section 15 (5) and continued:] The argument of the defendant has been concentrated upon the opening words of section 7 (1). It is said that the only orders or other activities which the section contemplates and empowers the Board to make or direct are orders and other activities which can fairly be required, or justified, on the face of them, for achieving the object of preventing the payment of moneys to enemies, and (whether the word is used conjunctively or disjunctively) of preserving enemy property in contemplation of arrangements to be made at the conclusion of peace.

So far as the latter words are concerned, Mr. Mould observes that it has never been the policy of English law to confiscate the property of enemies (for which proposition there is, indeed, well-established authority), and he contends, accordingly, that, with the orders vesting in the custodian the marks and any other property capable of being thereby vested, the powers of the Board of Trade under section 7 were exhausted quoad the marks and any such other property. Mr. Mould conceded that, in the case of consumable goods, and perhaps some other kinds of property, a power of sale and a sale would be justified, and, therefore, implicitly conferred, on the ground that, having regard to the nature of the property, nothing, or nothing of value, could otherwise be "preserved" in contemplation of peace arrangements; but these considerations could, according to his argument, have no place in the case of the trade marks here in question, or, indeed, in the case of the shares in the plaintiff company.

I have no doubt that, unless the opening words of subsection (1) have the limiting or restrictive effect for which Mr. Mould contends, the opening words of paragraph (*d*) of the subsection, the final three lines of the subsection and the terms of section 15 (5) are together amply sufficient, upon their ordinary construction, to justify the conferment of a power of sale or transfer and its subsequent exercise. The question, then, resolves itself into that of construing the opening words of subsection (1).

Upon this matter we had the advantage, in addition to hearing Mr. Tookey, of hearing also the argument of Mr. Ashworth (who had been instructed by the Board of Trade) as amicus curiae. It was submitted to us that the formula here used—"with a view to preventing" etc.—is quite distinct from the formulae used in other Acts—for example, the Town and Country Planning Act, 1947, and the Supplies and Services (Transitional Provisions) Act, 1945, where the power conferred on the Minister or Government Department are powers to make orders or do other acts for a particular purpose, for example, in the case of section 43 of the former Act, to acquire land "for "any purpose connected with the performance of their functions "under the following provisions of this Act" etc. (see *Earl Fitzwilliam's Wentworth Estates Co.* v. *Minister of Housing and Local Government*[4]), and, in the case of the latter Act, to make orders "for the purpose of so maintaining, controlling and regu-"lating supplies and services as (a) to secure a sufficiency of "those essential to the well-being of the community . . ." etc. (see *Blackpool Corporation* v. *Locker*[5]).

In the present case, the formula used is not, according to the argument, upon its fair interpretation an expression of the purposes to the achievement of which the orders to be made by the Board of Trade must be directed, but is rather an expression of the Parliamentary purpose in conferring upon the Board of Trade the order-making powers later specified. In support of this argument it was pointed out that, in the trading with the enemy legislation passed on the occasion of the first world war, the corresponding Parliamentary intention was expressed by way of a preamble to the Act. The preamble to the Trading with the Enemy (Amendment) Act, 1914, is thus framed: "Whereas it is expedient to make further provision for pre-"venting the payment of money to . . . 'enemies,' . . . and "for preserving, with a view to arrangements to be made at the "conclusion of peace, such money and certain other property "belonging to enemies; . . ." This earlier legislation remained on the statute book until it was repealed by the Act of 1939 now in question; and it was forcibly argued to be highly unlikely that Parliament, in enacting new trading with the enemy legislation on the occasion of the outbreak of the second world war, could have intended by what is in effect a transposition of the preamble in the old Act, still subsisting until the repeal, to cut down substantially the powers conferred.

---

[4] [1952] A.C. 362; [1952] 1 T.L.R. 521; [1952] 1 All E.R. 509.

[5] [1948] 1 K.B. 349; [1948] 1 All E.R. 85.

I was, for myself, somewhat troubled by what appears as a cross-heading immediately before section 7 in the print of the Act, bound up with the orders made thereunder, with which we were supplied, namely, "Property of Enemies and Enemy Sub-"jects. Collection of enemy debts and custody of enemy "property." But a reference to the King's Printer's copy of the Act in the Law Reports shows that the second part of the cross-heading is not in fact any part of the Act. In the circumstances I think that the argument put forward by Mr. Tookey and Mr. Ashworth is well founded and that the opening words of the subsection ought not to be treated as having the restrictive effect for which Mr. Mould contends.

But if I am wrong upon that matter, there is, in my judgment, a second answer to the defendant's attack upon the vires of the power of sale and transfer and its exercise, namely, the effect of the Distribution of German Enemy Property Act, 1949, and the Distribution of German Enemy Property (No. 1) Order, 1950, made thereunder (S.I. 1950, No. 1642). This Act (passed, we were told, in implementation of the Potsdam Agreement and other later Allied conferences), is described in its preamble as "an Act to provide for the collection and realization of German "enemy property and for the distribution of the proceeds thereof," and provided by section 1 (1): "His Majesty may by Order "in Council make provision for the collection and realization "of German enemy property and for the distribution of the pro-"ceeds thereof, to such extent as may be prescribed by the "order, to persons who establish claims in respect of German "enemy debts." It is not in doubt that the words "German "enemy property" were apt, by virtue of the interpretation section, to comprehend the marks and other property here in question. I need not refer at length to the terms of the order of 1950, No. 1642. Paragraph 18 (1) and (3) of that order were as follows: "(1) Except in accordance with the foregoing provi-"sions of this part of this order, or with the consent of the "administrator, no person other than a custodian shall transfer, "dispose of or otherwise deal with any German enemy property; "and any transfer, disposal or dealing in contravention of this "paragraph shall be void." "(3) Nothing in this article shall "prohibit or restrict the transfer or disposal of or dealing with "any property or the payment of any money—(*a*) by or to a "custodian, or (b) in accordance with any direction, or with the "consent, of the Board of Trade."

In my judgment the passing of the Act of 1949 materially altered the nature of any arrangements that could reasonably be contemplated as likely, or, indeed, possible, to be made at the conclusion of peace. Thenceforward it was, as it seems to me, plain that any such arrangements would not comprehend the return to German nationals of property formerly belonging to them, such as the trade marks here in question (at least if capable by their nature of being sold or disposed of); and that thenceforth it was the duty of the Board of Trade, in contemplation of arrangements which would ultimately be made for applying the proceeds of German enemy property in the manner indicated in the Act of 1949, to realize the trade marks to the best advantage as occasion offered. In these circumstances, even if prior to the passing of the Act of 1949 the terms of the opening lines of section 7 (1) of the 1939 Act would not have justified the making of vesting order No. 238B and the assignment of June 15, 1951, thereunder, after the passing of the Act of 1949, both the order and the assignment became intra vires the Board of Trade to make and execute or direct to be executed. In my judgment this conclusion can clearly in no way be affected by anything stated by the Board of Trade in the Trade Marks Journal for February 4, 1953, which related exclusively to trade marks vested in the custodian by virtue of the later Trading with the Enemy (Custodian) (No. 2) Order, 1951 (S.I. 1951, No. 779).

Mr. Mould has, however, assailed the assignment of June 15, 1951, upon the separate ground that, even if it were competent for the Board of Trade to sell or direct the sale of the marks—that is, a transfer of them for a proper consideration in money or money's worth—there was no power for the Board to relinquish them or give them away, which was what, on the face of it, the assignment purported to do. Although I do not doubt the truth of Mr. Mould's assurance that this point was put to Danckwerts J., I equally accept Mr. Tookey's statement that he had not himself apprehended it, and I think it equally clear that the judge on his part failed also to appreciate the point, for he said[6]: "It is common ground that the price paid for the "shares was a large sum of money, and it appears to have been "affected by the consideration that an order would be made by "the Board of Trade providing for the transfer of the trade marks

---

[6] (1953) 70 R.P.C. 102, 106.

"and the goodwill of the business in the United Kingdom by the "custodian to R. J. Reuter Co. Ld."

I have already said that it is obvious, to my mind, that that must have been so; and Mr. Tookey informed us that, had it been necessary for him so to do, he could without difficulty have proved the connexion between the two matters and the true consideration for the sale of the marks and goodwill, if any. It is, moreover, clear that such evidence would have been admissible on general principles, and Mr. Mould could not have relied on any estoppel to the contrary effect. Unless, therefore, the point was clearly raised and treated as open in the court below (as I think it was not) the answer to this argument on Mr. Mould's part is, in my judgment, that in any case it is not fairly open to him upon his pleadings. The attack upon the assignment was made, and made exclusively, by paragraph 13 of the counterclaim, whereby it is alleged: "The purported assignment . . . was at "the date thereof ultra vires invalid and of no effect." Of this paragraph the plaintiff company by letter dated August 8, 1952, addressed by their solicitors to the solicitors of the defendant sought particulars "specifying the facts and matters "which the defendant alleges caused the assignment to be ultra "vires" etc. The answer to that request was as follows: "The "facts and matters relied upon are the vesting orders Nos. 238, "238A, and 238B, the relevant statutes and statutory orders and "instruments relating to dealings with enemy property and purported assignment referred to together with the facts and "matters in the particulars supplied below under (*a*), (*b*), (*c*) "and (*d*) under paragraph 17 and the status of the parties at "the relevant time." The particulars under (*a*), (*b*), (*c*) and (*d*) under paragraph 17 related to matters of the get-up of the plaintiff company's goods and are in no way connected with the consideration for the assignment of June, 1951. Further particulars were given later by the defendant, pursuant to an order of Upjohn J., of the status of the parties and of the statutes, statutory instruments, etc., referred to in the earlier particulars, but nothing in these later particulars was remotely connected with the consideration for the assignment. It is, in my judgment, not sufficient in the circumstances, and, having regard to the detailed particulars which the defendant gave in fact, for the defendant to point to the terms of the assignment and to say that the absence of consideration is obvious upon the face of it. As I have said, I think that this point (which appears to me in any case to be without substance) is not open to the defendant upon his pleadings.

Before leaving this matter, I should, however, refer to the certificate as to value which constitutes the third paragraph of the assignment and to which Mr. Mould not unnaturally pointed as a denial, on the face of the instrument, of there being, in fact, any other consideration for the transfer of the marks than the covenant contained in the deed. I concur with Danckwerts J. in feeling some doubt of the propriety of the certificate in the circumstances of the assignment. Mr. Tookey referred us to *Attorney-General* v. *Cohen* [7] as authority for the view that a "series of transactions" within the meaning of section 73 of the Finance (1909–10) Act, 1910, must be a series of transactions between the same parties; and in the present case the parties to the assignment of the shares were not the same as the parties to the assignment of the marks. In this case, however, the question is not whether the latter assignment was part of a series of transactions but rather whether it was part of a larger transaction. In any case, however, the objection to the certificate is not, in my judgment, available to the defendant, who was not a party to the deed and cannot rely upon the certificate as creating an estoppel in his favour. My conclusion, therefore, upon the points raised by the defendant under the trading with the enemy legislation, is in accordance with the view of Danckwerts J. that they cannot be sustained.

I turn, therefore, to the arguments under the Trade Marks Act, 1938. I have already tabulated them and, save for the substantial and difficult question under section 22 (4) of the Act, I can deal with them briefly; for I agree with Danckwerts J. in rejecting all of them. I shall take them in the order in which I have stated them, save that it will be convenient to postpone consideration of the contention made under section 7 of the Act until after I have considered the argument under section 22 (4). First, section 22 (7) of the Act. [His Lordship read subsection (7) and continued:] I have already stated the point made by the defendant under this subsection, namely, that, no directions having been given and the registrar indeed having held, wrongly, that the subsection was inapplicable, the assignment never became effective. The relevant facts are stated in greater detail by the judge. From this recital it appears that the plaintiff company applied in the usual form to the registrar for registration of themselves as proprietors of the marks by virtue of the assignment, and tendered the assignment showing that its subject-matter was the marks together with " the goodwill (if any) " etc. Thereupon, at the suggestion of the registrar or those acting on his behalf, the application was altered so as to state that " the trade marks " at the time of the assignment were not used in the business " of the assignor . . .", the view of the registrar being that the word " business " in the second line of the subsection meant the business of the assignor; in which case it followed, since the custodian carried on no business, that the subsection therefore did not apply. If this view were wrong, I agree, nevertheless, with Danckwerts J. that[8] " it is hard to see how the assignment was otherwise than in connexion with the goodwill of the " business in which the trade marks were used," in fact. In any case, the question what advertisements, if any, should be published by the assignee was a matter for the registrar. The plaintiff company made its application in due form and without any attempt to avoid compliance with the subsection. All that followed was the result of the view taken of the matter by the registrar.

---

[7] [1937] 1 K.B. 478; 53 T.L.R. 214; [1937] 1 All E.R. 27.

In my judgment there is nothing on the facts proved which enables the defendant to challenge the effectiveness of the assignment under this subsection; and I therefore agree with Danckwerts J. in rejecting this part of his case.

Secondly, section 4 and section 8: The point sought to be made by the defendant under section 4, which was strenuously argued before us by Mr. Lloyd, is, as I understand it, that the envelope of which the plaintiff company complains, though having upon it a device clearly identical or so nearly identical with the plaintiff company's trade mark as otherwise to constitute infringement, is not an infringing use within this section 4, since the use was neither use as a trade mark (having particular regard to the terms of the definition in section 68) nor as an advertisement issued to the public. As regards the latter alternative, it was clearly shown to have been by way of advertisement and admitted as such by Schutte. It was also admitted that the envelope in the plaintiff company's hands was one of many sent to members of the public in England. As regards the former alternative, Mr. Lloyd argued that, for the use of the mark to be an infringing use, it must have been the present intention to use the mark in the United Kingdom in relation to goods in the course of some transaction which could fairly be described as trading in the United Kingdom; and it was said that (as I have already noticed) there was and is no present intention on the defendant's part to undertake any trading in the class of goods in question in the United Kingdom. I cannot find any justification for importing this qualification into the language of section 4. Since, admittedly, the device on the envelope was advertising matter, the use of the envelope constituted, in my judgment, an infringement of the plaintiff company's rights under section 4 if they are in other respects entitled to succeed.

---

[8] 70 R.P.C. 102, 115.

I can deal more briefly still with the argument under section 8, that the use of the device on the envelope was no more than a bona fide use (within the terms of the section) by the defendant of the name of his place of business. The bona fides of the defendant is not now in question, nor do I doubt that, as I have earlier explained, " No. 4711 " in connexion with the city of Cologne may fairly be said to be the name of the defendant's place of business. But the use here is not merely use of the number but the use of the number represented in a particular and characteristic way with the embellishment of the scroll and bell. Mr. Lloyd read the terms of section 68 (2): " References in this Act to the " use of a mark shall be construed as references to the use of a " printed or other visual representation of the mark. . . ." But we are here concerned not with the use of a mark but, as it is said, with the use by the defendant of the name of his place of business. In my judgment it is clear that, according to the ordinary meaning of language and the common sense of the matter, the use of this particular representation of the number " 4711 " is not within the protection of section 8 (*a*) of the Act. I therefore agree with Danckwerts J. that this defence also fails.

Thirdly, section 22 (4). I approach now what I have stated to be, and what to my mind is, the most substantial and difficult question raised in the appeal—one, moreover, which involves a consideration for the first time of the extent and effect of the change made in trade mark law by subsection (1) of section 22—" Notwithstanding any rule of law or equity to the contrary, " a registered trade mark shall be, and shall be deemed always " to have been, assignable and transmissible either in connexion " with the goodwill of business or not." The last few words, and particularly the use of the phrase " in connexion with," make it clear to my mind that, subject to whatever may be the effect of the qualification in subsections (3) and (4), it was from the passing of the Act contemplated that trade marks could be assigned, as it is said, " in gross," that is, dissociated from the goodwill of their business of origin. Beyond doubt this enactment involved a far-reaching and significant change in trade mark law, in which it had been previously regarded as fundamental that trade marks, whether registered or unregistered, being indicative of a particular origin, usually but not necessarily a manufacturing origin, could not be separated from the business of origin and from the goodwill of that business.

The old principle is well illustrated in *Lacteosote Ld.* v. *Alberman*,[9] before Clauson J., upon which Mr. Mould strongly relied, partly because of the similarity in language between the purported assignment in that case and the language of the assignment in the present case, and partly because, as he contended, the principle stated by Clauson J. survived the amending effect of the Trade Marks Act, 1938, and still applies so as to provide the answer to the present question.

The *Lacteosote* case[9] concerned a product known as Sirop Famel, which was at all material times manufactured in France according to the process and specification of M. Pierre Famel, a chemist in Paris, to whom, before the purported assignment, the mark in question had unquestionably belonged. The plaintiffs had for many years been the sole wholesale agents for the sale of Sirop Famel in the United Kingdom, but as such they were, of course, unable to sue in England for infringement of the mark. The purported assignment was intended to give to the plaintiffs that right, so as to enable them to prevent the sales of the Sirop in England by persons (the defendant being one) who, having purchased it in bottles in France, brought it over to this country to offer for sale here, which, by reason of the state of the exchange, they were able to do at a less price than that charged by the plaintiffs. The English trade mark was thereupon "assigned" by Famel to the plaintiffs "together with the goodwill of the business concerned in the goods with respect to which the said trade mark is registered." These goods were in fact described as "a pharmaceutical product for medical use made in France." It was plain, accordingly, that the assignment did not operate, and was never intended to operate, as an assignment of the goodwill of the entire manufacturing business in France.

It was, however, contended that the assignment[10] "must be treated as being what, obviously, all parties must have intended

---

[9] [1927] 2 Ch. 117; 43 T.L.R. 336; 44 R.P.C. 211.

[10] [1927] 2 Ch. 117, 129.

"it to be, namely, an assignment of the British portion of Famel's "business, namely, the business of importing a preparation into "Great Britain and selling it there." It was this argument which Clauson J. rejected, holding that, according to trade mark law, it was incompetent effectually to assign a mark, not together with the business of origin (and in this case, of declared origin) as a whole but with a department only of that business. The judge (who had earlier referred to the *Leather Cloth Co.* case [11] as the leading authority for the proposition that a purchaser of a mark becomes owner of it only if he becomes at the same time purchaser of the manufactory or the business concerned in the goods to which the mark has been affixed) used this language in stating his conclusion [12]: "If it were not so, the result would "be that a mark distinctive of goods produced and sold in the "business carried on by Famel would become by the assignment "distinctive, not of goods produced and sold in that business "by Famel, or his successors, but of goods sold in a newly "separated and, therefore, different business by persons who "succeeded Famel as vendors in Great Britain of the goods, but "not as producers of them. Such a position seems to me to be "inconsistent with the principle that a trade mark is distinctive "of goods with which a particular business (whether carried on "by the original trader or his successors) is concerned. If the "identity of the business is destroyed the mark is destroyed with "it." In my judgment Clauson J., in using the phrase "distinctive of goods," clearly meant in the context "distinctive "of the origin of goods."

It may well be that it is still true to say that a mark which is on the face of it distinctive of goods made by "A" cannot be assigned or transferred so as to be applied to goods made by "B"; for a trade mark is still distinctive of origin. (See *Aristoc Ld.* v. *Rysta Ld.*,[13] which decided that a trade mark could not be validly registered in respect of goods which was not distinctive of the business origin of the goods, but only of the fact that a repairing process had been applied to them.) A mark on the face of it distinctive of one origin, if applied to goods of a different origin, would prima facie be deceptive and therefore subject to the terms of section 11 of the Act.

It was not, however, suggested by the defendant in the present case that the marks, if registered in the name of the plaintiff company, would be so deceptive. They still indicate their manufacturing origin, which is, in fact, the plaintiff company's business; and in my judgment it is now clear that by virtue of section 22 (1) of the Act of 1938 a mark may be validly assigned by one manufacturer to another without any assignment of the business or goodwill of the assignor and so as thenceforth to be distinctive of a manufacturing origin different in fact from the previous manufacturing origin, so long, at any rate, as the mark is not deceptive. It is also no doubt true that since the Act a mark distinctive of a manufacturing origin, which is in fact the business of "A," may be assigned by "A" to "B" and will thenceforth be applied by "B" to goods originating from "A," so that the mark still remains distinctive of the same manufacturing origin. But circumstances of this character are not material to the present case.

---

[11] (1865) 11 H.L.C. 523.

[12] [1927] 2 Ch. 117, 130.

[13] [1945] A.C. 68; 61 T.L.R. 121; [1945] 1 All E.R. 34.

To the extent I have indicated, the earlier principles of trade mark law to which Clauson J. referred have, in my view, been altered by the express terms of the new Act. Nor did Mr. Mould contend to the contrary. An example was taken during the course of the argument which may be cited here as simply illustrative of the point and of the change made. A firm of well-known cigarette manufacturers and proprietors of a trade mark such as "Gold Flake" might, as I apprehend, effectively sell or transfer to another cigarette manufacturer the mark "Gold Flake" without any contemporaneous transfer of their own goodwill or any part thereof; and thereafter the mark, although still indicative of origin, would be indicative of the manufacturing origin of the assignee and no longer of the previous owners. So much I understood Mr. Mould to concede. If that is so, then, unless the registration of the mark in the assignee's name were held to be deceptive under section 11, it would appear not to matter that the goodwill previously attached to the mark was a manufacturer's goodwill, associated in fact with the well-known business of the assignors. I cannot, therefore, think that the validity of the transfer to the plaintiff company is affected by the circumstance, assuming it to be the fact, that, as Mr. Mould contended in opening his appeal, the goodwill attached to the marks was the goodwill of a manufacturer whose business was situated in Germany and was based on secret knowledge belonging to that German business. Indeed, as it seemed to me as the argument developed, Mr. Mould's point under the section was a different and narrower point, namely, that the vesting and transfer still left the defendant, once he had disembarrassed himself of his enemy character, with an unqualified right at common law to the use of the mark or badge, so as to bring into play the qualification placed upon subsection (1) of section 22 of the Act by subsection (4) of the same section.

It is appropriate at this stage to refer to the relevant language of section 22. I have already cited subsection (1). Subsection (2) is directed to the assignability of a mark in respect of part only of the goods in respect of which it is registered, and subsection (3) provides that unregistered (that is common law) marks are also assignable in gross, provided, inter alia, they are at the time of the assignment used in the same business as registered marks which are also assigned at the same time and to the same person. Then follows subsection (4). [His Lordship read subsection (4) and continued:] It follows, then, says Mr. Mould, that, if, notwithstanding an assignment, the assignor retains an exclusive right himself to use the same mark at common law, the assignment will be ineffective. That proposition I am prepared, at any rate for the purposes of the argument, to accept. Thus, to revert to my previous illustration, if, upon the sale of the trade mark "Gold Flake," it was provided by or resulted from the sale agreement that the sellers were still entitled to the use of the name or insignia of "Gold Flake" upon their own products, the assignment would be ineffective, and obviously and necessarily so, for the resultant competition would inevitably create deception and confusion. But has the defendant, as he contends that he has, such an exclusive right at common law within the terms of the section as entitles him to bring an action for passing-off, as or against any third party who seeks to make use of the number "4711" in regard to perfume? In my opinion he has not. Mr. Mould sought to rest this part of his case largely on two propositions: (1) that, as a fact, there was a substantial number of persons, members of the public in England, to whom the use of "4711" in relation to eau de cologne signified the products of the German business, and (2) that the "exclusive right" in the subsection meant no more than the mere right to exclude others from using the badge. In my judgment neither premise is established or valid.

Upon the matter of fact, the judge, who heard the evidence of the dozen or so witnesses called, came to the conclusion that such evidence was "of no assistance." Upon a matter of this kind, where the weight of the evidence must depend upon the way in which it was given no less than on the words in fact used, I should hesitate long before drawing a different inference from that of the trial judge. And plainly, if the defendant is unable to prove the requisite association of the marks with his business, any passing-off action on his part must fail.

I will, however, assume that the witnesses should be taken as proving the association alleged; and, as the judge himself observed, to anyone at all well acquainted with the pre-war German-made "4711" confusion would be inevitable. Still I do not think that the defendant is entitled to succeed in his claim for passing-off. He is conducting in England no business, selling here no goods. As it seems to me, he has not in this country any proprietary right which he is entitled to protect. Proof of the facts, as I have assumed, does not create or give him such a right. Reverting again to my example; if the sale by the cigarette manufacturers were of their English trade mark "Gold Flake," with the English goodwill connected therewith, and if the sellers covenanted not to use in England the name "Gold Flake" in connexion with any of their products, it could not affect the matter that, as would no doubt be the case, large numbers of people continued to associate the name "Gold Flake" with the old and well-known manufacturing business. And if the sellers retained the right to the use of "Gold Flake" on cigarettes made by them here but for sale outside this country, the terms of the proviso to section 22 (4) show that the assignment would not be invalidated under that subsection. Equally, in the case supposed, the original manufacturers would, as I think, have no cause of action for passing-off against a third party who used the name "Gold Flake" on cigarettes of his manufacture for sale by him in England.

Nor am I satisfied that the "exclusive right" referred to means no more than the mere right to exclude others. According to the ordinary use of language an "exclusive right" to the use of something, whether a room in a house or a trade mark, signifies primarily the "sole" or "single" use. In the case of one having been given the exclusive use of another's room, he is probably not in law able to exclude others, having no such proprietary or other interest as would support an action for trespass. In the case of a trade mark, whether registered or unregistered, the proprietary right is no doubt sufficient to support an action to exclude. Nevertheless, I cannot think that, at any rate in the absence of some very special circumstances, a person who is not trading in this country and has in this country no proprietary interest in a name or mark can be said to have "the exclusive right" contemplated by section 22 (4) because

C. A.
1953

R. J. REUTER Co. LD.
v.
MULHENS.

Evershed M.R.

of the goodwill he possesses in another country. As Danckwerts J. observed, we are not here concerned with the respective rights which the plaintiff company or the defendant may have in some other country, say in Eritrea. Those rights will, presumably, depend on the laws of that other country. The question, and the only question, with which we are concerned is whether the defendant in this country has any such proprietary interest, under common law or otherwise, in the mark or badge or in the business of making and selling eau de cologne as will support a claim on his part for passing-off against the plaintiff company or any other person.

I agree with Mr. Tookey that the vesting and assignment of the trade marks, whether (having regard to section 22 (1)) the latter was expressed to be in connexion with the goodwill of a business or not, prima facie operated to confer upon the plaintiff company all rights, whether statutory or at common law, to the use of the mark or badge. Further, the vesting and assignment, according to their terms, operated to assign to the plaintiff company " the goodwill (if any) in the United Kingdom of the " business concerned in the goods for which the trade marks are " registered "—that is, all the business goodwill with which the marks had been associated in this country and which, apart from the war, would or might have belonged to the defendant. The nature of goodwill has been many times stated; it represents in connexion with any business or business product the value of the attraction to customers which the name and reputation possess. However difficult of identification, an English goodwill appears to be a species of English personal property capable of being sold or charged (as commonly in the case of a company's goodwill by debentures) or of being bequeathed by will (see *In re Betts, decd.*[14]). And in the case of a business product sold all over the world, the English goodwill, dependent on the English trade in the product, may be a proprietary interest distinct from the goodwill concerned with the trade in the product in another country. See, for example, the " Chartreuse " case (*Lecouturier* v. *Rey*[15]), where the respondents, who were in fact the original producers and held the secret of the liqueur, were held entitled to the English trade marks, and therefore to the English goodwill, notwithstanding the sale by order of a competent French court of the goodwill of the business in France, and the " Dario " case (*Impex Electrical Ld.* v. *Weinbaum*[16]), where the mark was held validly registered in England in the name of the plaintiffs, who carried on the business of marketing under that name valves manufactured by a French company, who sold them in France under the same name but themselves did no business in England. See also the terms of the proviso to section 22 (4) already noticed.

---

[14] [1949] W.N. 91; [1949] 1 All E.R. 568.

[15] [1910] A.C. 262; 26 T.L.R. 368.

[16] (1927) 44 R.P.C. 405.

It seems to me, therefore, that the plaintiff company is entitled to say that it is in the same position, vis-à-vis the defendant, as if the defendant had voluntarily sold to the plaintiff company, not only all his English marks relating to eau de cologne, but the goodwill formerly belonging to him in England by virtue of the association of those marks, on sales of the products in England, with the products of his manufacturing business, together with the right, which a sale of goodwill confers, to represent themselves as the defendant's successors in that business. Such a transaction might have taken place; and, if it had done so, the defendant could clearly not thereafter have said that the mark was inseparable from his manufacturing business in Germany. If the plaintiff company's rights are as I have described them, then, in my judgment, the defendant cannot now bring an action for passing-off against the plaintiff company and cannot invoke section 22 (4) of the Trade Marks Act, 1938, to invalidate the assignment to the plaintiff company.

Reference was made by Mr. Mould to *Green & Sons (Northampton) Ld.* v. *Morris* [17] in support of the general proposition that, since the assignment to the plaintiff company had been an involuntary assignment, from the point of view of the defendant, of his former property, the rights acquired by the assignee are of a far more limited character than would have been obtained from a voluntary assignment from the defendant himself. But *Green & Sons (Northampton) Ld.* v. *Morris* [17] (a case of an assignment of a business with its goodwill by a trustee under a deed of arrangement), which followed the earlier case of an assignment by a trustee in bankruptcy, *Walker* v. *Mottram*,[18] establishes only that the assignee under an involuntary assignment fails to obtain those benefits which require the covenant of the assignor, namely, the covenant normally given by a vendor upon a voluntary sale, not personally to compete with the business sold or to solicit in his own name his old customers. Nothing in those cases qualifies the right of an assignee under an involuntary assignment to enjoy the benefits properly flowing from an assignment of goodwill, including the right to represent himself

[17] [1914] 1 Ch. 562; 30 T.L.R. 301. [18] (1881) 19 Ch.D. 355.

as carrying on the business as the successor of its former owner. For these reasons I think that the judge rightly rejected the defendant's contentions based on section 22 (4) of the Trade Marks Act, 1938, and that part also of his counterclaim directed to alleged passing-off.

Fourthly, section 7. [His Lordship read section 7 and continued:] The defendant's argument under this section, as presented by Mr. Mould in his opening speech, involved the proposition that the word "proprietor" in paragraph (*a*) meant "beneficial proprietor" as distinct from the registered proprietor or legal owner, and that the defendant had not ceased continuously to use the marks in question by reason of his disability due to the war and his enemy status. Whatever may be said of the latter of these propositions, I have been wholly unable to accept the former, for which it does not seem to me that there is any warrant according to the fair construction of the language. But Mr. Mould made it clear in his reply that the validity of his point under this section depended upon his establishing that the assignment of the marks to the plaintiff company involved a forfeiture or confiscation of the rights previously vested in the defendant so as to create, as it were, a new root of title on the assignment, or the previous vesting in the custodian, and to disentitle the plaintiff company to treat themselves as the successors in title of the defendant in respect of the marks. I confess that I have experienced some difficulty in appreciating this argument; but, in any case, the reasons I have given for rejecting the defendant's arguments under section 22 (4) necessarily involve a refutation of the premise that the assignment to the plaintiff company operated by way of a forfeiture or confiscation of the defendant's rights. This point, therefore, falls to the ground. In the result I think that Danckwerts J. was correct in all his conclusions and I would dismiss both the appeal and the cross-appeal.

BIRKETT L.J. I agree with the judgment of the Master of the Rolls which has just been delivered. That judgment has dealt so completely with the contentions raised before the judge in the court below and in this court that no useful purpose would be served by travelling over the same ground again and finally re-stating the same conclusions. I have also had the opportunity of reading the judgment that my brother, Romer L.J., will deliver, dealing particularly with the argument addressed to us on section 22 (4) of the Trade Marks Act, 1938, and to his judgment on that matter I have nothing to add, except to state my agreement with it.

But there is one further matter upon which I think it is perhaps desirable that I should say a very few words. Mr. Mould, in the course of his arguments on behalf of the defendant, made certain submissions upon the true construction of the Trading with the Enemy Act, 1939. He made those submissions with great force, and at times with great fervour, and he clearly regarded them as being of great importance in the presentation of his case. The opening words of section 7 of the Act of 1939 were the words on which Mr. Mould relied, and the material words of the whole section have already been set out in full in the judgment of the Master of the Rolls. Perhaps I may repeat the most material words in the first subsection to section 7: "With a view to preventing the payment of money to enemies, "and of preserving enemy property in contemplation of arrange- "ments to be made at the conclusion of peace, the Board of "Trade may appoint custodians of enemy property . . . and may "by order . . ." Then follow the detailed matters with which the orders may deal, which have already been read. The first order, with which we are concerned, was made on June 26, 1940, and it related to the 35,186 shares in the plaintiff company then registered in the name of a subsidiary company of the defendant. The second order, with which we are concerned, was made on January 31, 1941, and related to the trade marks. The third order, and perhaps the most vital one of all, was made on April 17, 1951, and it gave power to the custodian, in whom the trade marks had been vested by virtue of the order of January, 1941, to assign and transmit the trade marks either in connexion with the goodwill of the business or not. In June of 1951 the two assignments, which have already been described, were executed, the first dealing with the sale of the shares, and the second dealing with the transfer of the trade marks.

The submission of Mr. Mould was that the powers of the Board of Trade to make orders was limited by the opening words of section 7. The Board of Trade were confined to the purposes of preventing the payment of money to enemies, or preserving enemy property in contemplation of arrangements to be made at the conclusion of peace, because, on the true construction of section 7, no other order-making powers were given to the Board of Trade. It is fairly plain, I think, that if the whole of section 7 is read and considered in conjunction with section 15 (5) of the Act larger powers are in fact given to the Board of Trade. For example, the Board may by order confer and impose on the custodian such rights, powers, duties and liabilities as may be prescribed as respects property which has been vested in the custodian. But Mr. Mould submits that, despite such wording, everything is governed by the opening words of the section. He says that what has been done in this case by the Board of Trade amounts to confiscation of the property of an enemy, and that confiscation of the property of enemy subjects is not the law of this country. It is true that in the House of Lords both Lord Finlay L.C. and Lord Haldane asserted that the law of this country does not in general confiscate the property of an enemy. In *Daimler Co. Ld.* v. *Continental Tyre and Rubber Co. (Great Britain) Ld.*[19] Lord Parker said: "Subject to any legislation to "the contrary, or anything to the contrary contained in the treaty "of peace when peace comes, enemy property in this country "will be restored to its owners after the war just as property in "enemy countries belonging to His Majesty's subjects will or "ought to be restored to them after the war."

It is to be observed that the Trading with the Enemy (Amendment) Act, 1914, contained a preamble substantially in the same form as the opening words of section 7 of the Act of 1939; and in *In re Münster (Enemy)*[20] Russell J. said: "In my judgment the "Act of 1914 does not depart from these principles or involve "confiscation. Under its provisions the enemy is deprived of "beneficial ownership during the war, and the custodian after the "termination of the war is bound to deal with it in such manner "as His Majesty (keeping no doubt in view the arrangements "made at the conclusion of peace) may by Order in Council "direct." He had said earlier[21]: "The phraseology used in "the preamble and in section 5 establishes in my judgment that, "pending its disposition by Order in Council after the determination of the war, the property is removed from the control and "from the beneficial ownership of the enemy. At the termination of the war fresh considerations will arise; and whether the "enemy will recover, and to what extent he will recover, the "beneficial ownership will depend upon the arrangements made "at the conclusion of peace (referred to in the preamble) and upon "the terms of any Order in Council, made, I doubt not, with those "arrangements in view, under section 5."

The Master of the Rolls has already pointed out the difference between the words used in the first subsection to section 7

---

[19] [1916] 2 A.C. 307, 347.

[20] [1920] 1 Ch. 268, 278.

[21] Ibid. 277.

C. A.
1953

R. J. REUTER Co. LD. v. MULHENS.

Birkett L.J.

of the Act of 1939 and the words used in other enactments conferring powers to make orders for specific purposes; and, when the preamble to the Act of 1914 is also kept in mind, the argument addressed to us by Mr. Tookey and Mr. Ashworth receives strong support. They submitted that it was quite wrong to construe the opening words of section 7 in the manner contended for by Mr. Mould, and that the true construction was that the words were intended not to limit the Board of Trade to making orders only for the purposes set out in the opening words, but were rather expressive of the purpose Parliament had in mind when giving to the Board of Trade the powers to make orders relating to the many matters specified in some detail. In my opinion the construction contended for by Mr. Tookey and Mr. Ashworth is a reasonable one, and I think the right one, and I think that the argument of Mr. Mould fails.

I need add nothing to what the Master of the Rolls has already said about the effect of the Distribution of German Property Act, 1949, and the statutory instrument made thereunder. As from the date of the passing of that Act, it was plain that no arrangements on the conclusion of peace would include the return of this property to German nationals, and the Board of Trade had a clear duty to act in accordance with the statute, and to deal with the trade marks in question in the way which brought the greatest advantage. When the transfer of the trade marks was made in June, 1951, it was made in the light of the provisions of the Act of 1949, and the statutory instrument; and the "arrangements to be made at the conclusion of peace," referred to in section 7 of the Act of 1939, could never be such arrangements as would contemplate the handing back of this enemy property to German nationals.

Neither need I add anything to what has already been said about the argument Mr. Mould addressed to us, that, even if there were power to sell or transfer the trade marks for good consideration, there was no power to part with them for nothing. My Lord has dealt with the facts of that situation and I need not repeat them. I merely repeat that I agree with the judgment of my Lord in dismissing this appeal.

ROMER L.J. I agree. As the Master of the Rolls has pointed out in his judgment, the most difficult point in this case is that which arises out of section 22 (4) of the Trade Marks Act, 1938, and such observations as I propose to make are mainly confined to this particular feature, which is, I think, both novel and interesting.

The firm of Mulhens (to whom, for convenience, I will refer hereafter as " the defendants ") cannot successfully invalidate the assignment by the custodian to the plaintiffs of June 15, 1951, by invoking section 22 (4) of the Act, unless they can show that at the date of the assignment they (the defendants) possessed exclusive rights at common law to the use in this country, in relation to eau de cologne, of the trade marks which are in dispute in the present proceedings. That they possessed such right in, and for many years prior to, 1939 can hardly be open to doubt; and the question would accordingly appear to be whether their rights continued to subsist in them notwithstanding the Trading with the Enemy Act, 1939, and of the relevant orders made thereunder; and, if so, whether in any event such rights survived the assignment to the plaintiffs.

The defendants' business before the war consisted of the manufacture in Cologne of the secret essences which constituted the vital elements in their " 4711 " products and the marketing of such products in many countries, of which Great Britain was one. They sold their goods to the public of this country through the medium of the plaintiffs, who were the sole concessionaires. For the purpose of protecting their trade in Britain, they caused to be registered, inter alia, the trade marks which are now in issue, and thus acquired the statutory rights which such registration conferred. Apart from these rights, however, they had their rights at common law arising out of long user of the marks and the resulting association in the minds of purchasers in this country between such marks and the particular goods to which they were applied.

As was pointed out by Lord Parker in *A. G. Spalding & Bros.* v. *A. W. Gamage Ld.*,[22] an invasion by a third party of the rights conferred at common law by reason of the use of the marks would have constituted a violation of the defendants' goodwill in the business in connexion with which the marks were used. In other words, the rights formed part of such goodwill. Did that goodwill have a locality and, if so, what was the locality? Was it in Cologne, where the secret essences were manufactured? Did it exist, as an indivisible entity, in all the markets of the world to which the defendants resorted? Or was its habitat Britain? I cannot but think that the goodwill in question was attached,

[22] (1915) 32 R.P.C. 273, 284.

C. A.
1953

R. J. REUTER CO. LD. v. MULHENS.

Romer L.J.

and solely attached, to the business which the defendants carried on in this country as a distinct and severable enterprise and in respect of which the defendants had had the trade marks registered. If so, then the goodwill did possess a locality and that locality was Britain. This conception is in accord with the following observations of Lord Lindley in *Commissioners of Inland Revenue* v. *Muller & Co.'s Margarine Ld.*[23]: "Goodwill regarded "as property has no meaning except in connexion with some "trade, business, or calling. In that connexion I understand the "word to include whatever adds value to a business by reason of "situation, name and reputation, connexion, introduction to old "customers, and agreed absence from competition, or any of these "things, and there may be others which do not occur to me. "In this wide sense, goodwill is inseparable from the business "to which it adds value, and, in my opinion, exists where the "business is carried on. Such business may be carried on in one "place or country or in several, and if in several there may be "several businesses, each having a goodwill of its own."

Applying these observations to the facts of the present case, I am, as I have said, of opinion that the defendants possessed amongst their assets in 1939 a business goodwill in Great Britain by virtue of which they could have sued at common law in respect of the unauthorized user of their marks, as also in respect of any imitation of the general set-up of their goods which might amount to passing off. From this it follows that, as both the trade marks and the goodwill of the defendants' business here were enemy property when the war broke out, they fell to be dealt with in accordance with the provisions of the Trading with the Enemy Act, 1939, and could properly be, and were, vested in the custodian. Such vesting operated as an assignment of the assets, albeit involuntary, by the defendants to the custodian.

It is true that, as has been pointed out on many occasions, and most recently by this court in *Bank voor Handel en Scheepvaart N.V.* v. *Slatford*,[24] the beneficial interest of the defendants was not utterly destroyed by the vesting of the assets in the custodian. The beneficial interest therein was thenceforward in a state of suspense, but it is clear that, so long as that state lasted, the goodwill of the defendants' business here was taken out of the defendants and reposed thenceforth in the custodian. Nor could the defendants, during the war, attempt to build up a substituted goodwill in this country, for they were precluded from trading here at all.

---

[23] [1901] A.C. 217, 235; 17 T.L.R. 530.

[24] [1953] 1 Q.B. 248.

On June 15, 1951, the custodian assigned the registered trade marks to the plaintiffs. It may well be that this assignment in itself would have carried to the plaintiffs the rights at common law to the marks without express mention. Be that as it may, the custodian did, in addition to transferring the registered trade marks, specifically assign the goodwill as well. In these circumstances, it is difficult to see how, at the time of or after the assignment, any common law rights to the marks remained vested in the defendants, let alone the "exclusive" rights upon which the invalidating provisions of section 22 (4) of the Act of 1938 are based. Throughout the war and down to the date of the assignment, the defendants possessed no legal rights in relation either to the registered trade marks or in relation to the goodwill of the business which they had formerly carried on here. All that the defendants did possess was the suspended beneficial interest to which I have already referred, and if the custodian had the power to sell the trade marks and goodwill, as in my judgment he had, even this somewhat shadowy interest was automatically destroyed by the exercise of that power, and nothing survived to the defendants.

Inasmuch as the assignment was executed before the defendants became released from their enemy status, I am not sure how, on any view, the "result" (which presumably means immediate result) envisaged by section 22 (4) of the Act could be said to have arisen in the present case; but, apart altogether from that, I am of opinion that the subsection has no application, on the short ground that the common law rights, upon which the defendants rely, formed part of the goodwill of their former business in this country and that this goodwill constituted an asset which was capable of being and was vested in the custodian and validly assigned by him to the plaintiffs. It appears to me, in truth, that the essential basis of the defendant's argument to the contrary must be that the business which the defendants carried on in this country before the war had no separate or distinct goodwill of its own, and that the only relevant goodwill was a manufacturers' goodwill which was situate exclusively in Germany and was inalienable except with the defendants' business as a whole or was an indivisible goodwill situate in all of the countries in which the defendants traded. Once those conceptions of the position are rejected, as, in my opinion, they should be, I think that the results which I have indicated must logically follow on.

In conclusion, upon the bearing which section 22 (4) of the

C. A.

1953

R. J. REUTER CO. LD. v. MULHENS.

Romer L.J.

Act of 1938 has upon the position, I would like to express my agreement with the observations of the Master of the Rolls in his judgment with regard to the decision of Clauson J. (much relied upon before us by the defendants) in the *Lacteosote* case.[25] For the reasons which, and to the extent to which, my Lord has indicated, it appears to me that the earlier principles of trade mark law, which were so relevant to Clauson J.'s decision, have been abrogated by the Act of 1938.

On the question whether the opening words of section 7 of the Trading with the Enemy Act, 1939, have any, and if so what, operational effect, I should prefer myself to express no concluded opinion. I entirely agree, however, with the Master of the Rolls that the argument which the defendant sought to found upon that section is fully answered by the Distribution of German Property Act, 1949, and the General Order made thereunder. In any event, I do not accept Mr. Mould's contention that, on the true construction of section 7 of the Act of 1939, the Board of Trade could not authorize the custodian to sell any enemy property which had become vested in him unless such property was of a perishable or wasting nature.

On all other points which were argued before us I am in full accord with the reasoning and conclusions which the Master of the Rolls has expressed, and there is nothing that I wish to add. I agree that the appeal should be dismissed.

Appeal and cross-appeal dismissed.
Leave to appeal to House of Lords.

Solicitors: *Faithfull, Owen & Fraser; Slaughter & May; Solicitor to the Board of Trade.*

B. A. B.

---

[25] [1927] 2 Ch. 117.

C. A.

1953
Oct. 29, 30.

Evershed M.R., Jenkins and Morris L.JJ.

In re DANKBARS (AN INFANT).

[1953 D. 1004.]

Justices—Infant—Custody—Order for access—Variation of order by different court—Jurisdiction—Custody order including order for maintenance—Whether "order for the payment of money"—Guardianship of Infants Act, 1886 (49 & 50 *Vict. c.* 27), *s.* 5—*Criminal Justice Administration Act,* 1914 (4 & 5 *Geo.* 5, *c.* 58), *s.* 30 (3)—*Guardianship of Infants Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 45), *s.* 3 (4)—*Emergency Laws (Miscellaneous Provisions) Act,* 1947 (11 *&* 12 *Geo.* 6, *c.* 10), *Sch.* 2, *para.* 6—*Children Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 43), *s.* 53—*Guardianship and Maintenance of Infants Act,* 1951 (14 *&* 15 *Geo.* 6, *c.* 56), *s.* 1—*Magistrates' Courts Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55), *s.* 132, *Sch.* 6.

By an order of a court of summary jurisdiction at Eastbourne, Sussex, the custody of an infant was awarded to the mother and she was directed to allow the father to have access to the infant one half-day in every week. About three months later the father applied to a court of summary jurisdiction at Wallington, Surrey, asking that the order should be varied and, in particular, that he should be given control of the infant for seven days in every 10 weeks. The justices varied the order as asked. The mother appealed, alleging first that the justices had not jurisdiction to vary the order, and secondly, that the order as varied was unreasonable and should be discharged. Roxburgh J. held that the justices had jurisdiction and affirmed their order. The mother appealed:—

Held, first, that the justices had jurisdiction to vary the order for access, not by virtue of section 53 of the Children Act, 1948, but by virtue of section 1 of the Guardianship and Maintenance of Infants Act, 1951. That section (when read with sections 5 and 9 of the Guardianship of Infants Act, 1886, as amended by sections 3 and 7 of the Guardianship of Infants Act, 1925), enabled a court of summary jurisdiction to vary an order for the custody of an infant on the complaint of either parent, provided that at the time when the complaint was made either the complainant or the respondent resided in the place to which the jurisdiction of that court related.

The court took the view that section 53 of the Children Act, 1948, by including a reference to orders "for payment of money," meant to limit the jurisdiction conferred by it to that part of an order which was concerned with money payment.

Pratt v. *Pratt* (1927) 43 T.L.R. 523; 137 L.T. 491 and *Markham* v. *Markham* (1946) 63 T.L.R. 91; [1946] 2 All E.R. 737 distinguished.

Colchester v. *Peck* [1926] 2 K.B. 366; 42 T.L.R. 535 and *Rex* v. *Copestake* [1927] 1 K.B. 468 considered.

Held, secondly, that on the merits, the order as varied by the justices was unexceptionable.

Decision of Roxburgh J. affirmed, but on a different ground.

APPEAL from Roxburgh J.

The following statement of the facts is taken from the judgment of Evershed M.R. On December 15, 1952, the court of summary jurisdiction for the petty sessional division of the county borough of Eastbourne made an order upon the application of the complainant, one Livia Dankbars, committing to the complainant, the mother, the legal custody of a little boy born on November 3, 1950, being her son by her husband, Gaston

Valentine Dankbars. The order further provided that the father should thenceforth pay to the mother in the manner described the sum of £1 a week for the maintenance of the child whilst under the age of 16 years. The order for payment was expressed to be under the provisions of section 30 (1) of the Criminal Justice Administration Act, 1914.[1] It was also ordered that the father should pay a small sum towards costs; and finally that the father "shall have access to the said infant one half-day in each and "every week."

In March, 1953, the father applied to the court of summary jurisdiction for the petty sessional division of Wallington in the county of Surrey. By his application (which referred to section 3 (4) of the Guardianship of Infants Act, 1925 [2]) he asked that the order of the Eastbourne justices should either be discharged or should be varied. In particular, he asked that, in lieu of the provisions contained in the Eastbourne justices' order for access, there should be substituted a provision that the father should have the care and control of the infant "for a continuous "period of seven days in every 10 weeks."

The mother was represented before the Wallington justices by a solicitor, who took objection to the jurisdiction of the court, and at the end of the case he asked for an adjournment. The justices, however, took the view that it would be unfair at that stage to put the father to the expense of coming back and they declined to allow an adjournment. The father had given evidence-in-chief and had been cross-examined by the solicitor representing the mother. The Wallington justices evidently considered that the mother had behaved badly and that she had made no serious attempt to comply with her obligation under the Eastbourne justices' order, particularly in regard to the provisions as to access, and they made the following order: "It is adjudged "that the complaint" (that is, the complaint of the father) "is "true and it is hereby ordered that the said order" (that is, the order of Eastbourne justices) "be varied as follows, that is to say, "that the complainant shall have the complete care and control "of the said infant for a continuous period of seven days in every "10 weeks." That order was made on April 24, 1953.

---

[1] Criminal Justice Administration Act, 1914, s. 30: "(1) Where a court "of summary jurisdiction orders "money to be paid periodically by "one person to another, the court "may, if it thinks fit, order that the "payment shall be made through an "officer of the court or any other "person or officer specified in the "order. . . . (3) Any order made "either before or after the commencement of this Act by a court of summary jurisdiction for the periodical "payment of money may, upon cause "being shown . . . to the satisfaction "of the court, be revoked, revived, or "varied by a subsequent order."

[2] Guardianship of Infants Act, 1925, s. 3: "(2) Where the court "under the said section as so amended "[section 5 of the Guardianship of "Infants Act, 1886] makes an order "giving the custody of the infant to "the mother, then, whether or not the "mother is then residing with the "father, the court may further order "that the father shall pay to the "mother towards the maintenance "of the infant such weekly or other "periodical sum as the court, having "regard to the means of the father, "may think reasonable. . . . (4) Any "order so made may, on the application either of the father or the "mother of the infant, be varied or "discharged by a subsequent order."

The mother, being dissatisfied, appealed to Roxburgh J., the judge specially appointed to hear appeals under the Guardianship of Infants Acts, 1886–1925, and he held that the Wallington justices had jurisdiction and he affirmed their order.

The mother appealed.

James Comyn for the mother. The Wallington justices had no jurisdiction to vary the order made by the Eastbourne justices, but even if they had, the order which they made was, on the facts, unreasonable and ought to be discharged. Roxburgh J. would have found in favour of the mother had he not felt bound by *Pratt* v. *Pratt* [3] and *Markham* v. *Markham* [4] to hold otherwise. Those cases, however, turned on a different statute and are distinguishable.

Section 53 of the Children Act, 1948,[5] relates only to an "order for payment of money" and, apart from authority, it would not seem that an order, or part of an order, relating to access could be described as an order for the payment of money, though the terms of the order might include provisions for money payment. On the ordinary construction of the words used in section 53, it would seem that the power to vary should be limited to the financial provisions of the order, however closely in practice they may be linked with other provisions. *Markham* v. *Markham* [6] and *Pratt* v. *Pratt* [7] are not analogous cases, and in *Markham* v. *Markham* [8] it is clear that even in dealing with that different context the court felt some difficulty in holding that there was jurisdiction, Lord Merriman referring[9] particularly to remarks of Shearman J. in *Colchester* v. *Peck*[10] which threw some doubt on the correctness of the decision in *Pratt* v. *Pratt*,[11] though, ultimately, he held that he was bound to follow *Pratt* v. *Pratt*.[11] *Colchester* v. *Peck*[12] was approved in *Rex* v. *Copestake*,[13] which was decided a few months later. These latter cases were both affiliation cases and, since section 53 of the Act of 1948 gives power to vary an order relating to the guardianship of infants "in like manner as an affiliation order," the two decisions on that subject are more germane to the present question than the two somewhat anomalous decisions relating to the maintenance of married women.

---

[3] (1927) 43 T.L.R. 523; 137 L.T. 491.

[4] (1946) 63 T.L.R. 91; [1946] 2 All E.R. 737.

[5] Children Act, 1948, s. 53: "An "order of a court of summary juris- "diction for the payment of money "under the Guardianship of Infants "Act, 1886, whether made before or "after the commencement of this Act, "may be enforced, varied or revoked "in like manner as an affiliation order, "and the enactments relating to "affiliation orders shall apply accord- "ingly, with the necessary modifica- "tions."

[6] 63 T.L.R. 91.

[7] 43 T.L.R. 523.

[8] 63 T.L.R. 91.

Colchester v. *Peck*[14] and *Rex* v. *Copestake*[15] decide that the jurisdiction of the court to vary does not extend to the adjudication of paternity contained in the affiliation order, but is limited to the provisions relating to the payment of money. There is power in guardianship of infant cases for the original court which made the order to vary it: that power is contained in section 3 (4) of the Guardianship of Infants Act, 1925, which was also the section under which the power to make an order for the payment of money first arose in these matters. Before that time, under the Guardianship of Infants Act, 1886,[16] a wife who obtained an order for custody had to rely on the common law obligation of the husband to maintain the child.

[EVERSHED M.R. The Children Act, 1948, refers to an order under the Act of 1886 for the payment of money; that is apparently inaccurate, for it is clear from the short title of the Guardianship of Infants Act of 1925 that the later Act is not to be regarded as being merely an amendment of the earlier Act—the two Acts are to be cited as one.]

If Parliament had intended to give power to vary the part of the order relating to access, it would have been simple to

---

[9] 63 T.L.R. 93.

[10] [1926] 2 K.B. 366, 373; 42 T.L.R. 535, 537.

[11] 43 T.L.R. 523.

[12] [1926] 2 K.B. 366.

[13] [1927] 1 K.B. 468.

[14] [1926] 2 K.B. 366.

[15] [1927] 1 K.B. 468.

[16] Guardianship of Infants Act, 1886, s. 5: "The court may, upon the "application of the mother of any "infant . . . make such order as it "may think fit regarding the custody "of such infant and the right of "access thereto of either parent . . . "and may alter, vary, or discharge "such order on the application of "either parent. . . ."

S. 9: "In the construction of this "Act the expression 'the court' shall "mean—in England the High Court "of Justice or the county court of the "district in which the respondent or "respondents or any of them may "reside."

C. A.

1953

DANKBARS, *In re.*

have said so in section 53 of the Act of 1948. That section speaks in terms of an order for the payment of money, and some meaning must be given to that limiting phrase. The purpose behind that limitation is that whereas the monetary matters are best dealt with by the court within whose jurisdiction the applicant is, other matters, such as the custody of the infant, can be more conveniently considered where the child is.

[The court then took the point that the jurisdiction arose, not under section 53 of the Act of 1948, read with section 30 (3) of the Criminal Justice Administration Act, 1914, and paragraph 6 of Schedule II of the Emergency Laws (Miscellaneous Provisions) Act, 1947,[17] but under section 5 of the Guardianship of Infants Act, 1886, read with section 3 of the Act of 1925, and section 1 of the Act of 1951,[18] and that the father resided within the jurisdiction of the Wallington justices at the time he made the complaint, even though the case was not put before the Wallington justices on that footing.]

On the facts the father was not resident within the jurisdiction of the Wallington justices at the material time and, further, it is not open to him in any event to rely on the Act of 1951 at this stage.

Michael Hoare for the father. Roxburgh J. was right in holding that the Wallington justices had jurisdiction, whether under the Act of 1951 or the Children Act, 1948. The two affiliation cases, *Colchester* v. *Peck*[19] and *Rex* v. *Copestake*,[20] are not in point. An affiliation order is made up of two distinct and separate parts; first, there is the adjudication of paternity. That is an adjudication in rem and is not, of its very nature, a matter which should be reconsidered and varied. Secondly, the order may contain a discretionary order for payment of money, and that part can be varied. Maintenance orders and orders made under the Guardianship of Infants Acts both concern matters which may require revision in the light of changed circumstances, and as the matters dealt with are closely interwoven, variation of one of the terms may necessitate variation of others. Thus, variation of the order for payment of money is closely connected with the provisions relating to the terms as to access. *Pratt* v. *Pratt* [21] and *Markham* v. *Markham* [22] establish that there is indisputable jurisdiction to vary maintenance orders, and those two cases should be followed here rather than the affiliation cases, which only decide that the adjudication of paternity cannot be varied, and do not deal with other matters which may be linked with the order for payment of money. In *Rex* v. *Copestake* [23] Shearman J. applied a test of convenience, and if that test is to be applied here, it is clear that the balance would tip in favour of allowing the order to be changed, for one element of the order is for the payment of money, and it would be highly inconvenient if only one of a number of inter-related matters could be altered. (See Maxwell on Interpretation of Statutes, 10th ed., pp. 191, 229.)

---

[17] "The following provisions shall "have effect as respects complaints "under subsection (3) of section 30 of "the Criminal Justice Administration "Act, 1914, or section 7 of the Summary Jurisdiction (Married Women) "Act, 1895, as amended" (the latter provision relating to orders for payment of maintenance in matrimonial proceedings) ". . . for the revocation, "discharge, revival, alteration or "variation of an affiliation order or "a maintenance order."

By sub-para. (2): "A complaint "may be made to a court of summary "jurisdiction having jurisdiction in "the place where the complainant is "for the time being, instead of to "the court which made the order "(hereafter in this paragraph referred "to as 'the original court')."

[18] Guardianship and Maintenance of Infants Act, 1951, s. 1: "Subject "to the following provisions of this "section, the expression 'the court,' "for the purposes of the Guardianship "of Infants Acts, 1886 and 1925, "means in England and Wales the "High Court or the county court of "the district, or a court of summary "jurisdiction having jurisdiction in "the place, in which the respondent "or any of the respondents or the "applicant or the infant to whom the "application relates resides."

[19] [1926] 2 K.B. 366.

[20] [1927] 1 K.B. 468.

Unlike an affiliation order, which contains two separate and distinct parts, an order under the Guardianship of Infants Acts is one whole, though it may deal with a number of matters. One of the principal matters dealt with in such an order is the provision for the payment of money; it is, therefore, an order for the payment of money within the meaning of section 53 of the Act of 1948. If, however, the order does not contain a term relating to the payment of money, there would nevertheless be power, it is submitted, to vary such an order under the Act of 1951.

The Act of 1948 embodies the expression which had been construed in *Pratt* v. *Pratt* [24] and *Markham* v. *Markham*,[25] and, therefore, unless it is clear, which it is not, that the words in section 53 were intended to bear a meaning different from that decided in those two cases, they ought to bear that meaning, which it must be presumed Parliament had in mind when re-enacting them.

Apart from the Act of 1948, the court has jurisdiction to vary the order under section 1 of the Act of 1951 which, when read with section 5 of the Act of 1886 and section 3 of the Act of 1925, enables either parent to apply to a court of summary jurisdiction having jurisdiction where the complainant resides for an order to vary any order made under the Acts of 1886 and 1925. The appropriate court will be that which has jurisdiction in the place where the parent applying is resident at the time when the application to vary is made; the choice of court is not restricted to the original application but will change from time to time after the original order has been made, when and if the parents, or either of them, changes his or her place of residence.

---

[21] 43 T.L.R. 523.
[22] 63 T.L.R. 91.
[23] [1927] 1 K.B. 468.
[24] 43 T.L.R. 523.
[25] 63 T.L.R. 91.

Comyn replied.

EVERSHED M.R. stated the facts as set out above, and after saying, with reference to the mother's disregard of the order of the Eastbourne justices, that if that order had been made by the High Court the mother would have been at some risk of proceedings being taken against her for contempt of court, he continued: Two points were taken on behalf of the mother before Roxburgh J. First, it was said that the Wallington justices had no jurisdiction to deal with this case; secondly, assuming that they had jurisdiction, the order which they made was wholly unreasonable, and ought, on the merits, to be discharged. The first point, as I shall later explain, is by no means free from serious difficulty and complexity; but Roxburgh J. felt that the case was concluded, so far as he was concerned, by *Pratt* v. *Pratt*[1] and *Markham* v. *Markham*,[2] both being decisions of the Divisional Court of the Probate, Divorce and Admiralty Division; and he, therefore, rejected the mother's suggestion that the court at Wallington had had no jurisdiction. He dealt summarily with the appeal on merits and expressed his view (which I entirely share) that on the merits there was no ground for disturbing the order made by the Wallington justices, assuming that they had the jurisdiction to make it.

The mother has now appealed to the Court of Appeal. I do not complain that the time of the court has been taken in considering this difficult point of jurisdiction, although, generally speaking, this court will not encourage appeals in matters relating to the guardianship of infants. I pointed out during the argument that if the appellant succeeded I could see nothing to prevent the father making another application to justices, either at Wallington or elsewhere, immediately; and if the appellant failed, there would be nothing to prevent her making another application to appropriate justices. However, the parties have come to the Court of Appeal and they are now entitled to the decision of this court on the points which have been raised.

---

[1] (1927) 137 L.T. 491; 43 T.L.R. 523.

[2] (1946) 63 T.L.R. 91; [1946] 2 All E.R. 737.

It is obvious that the view on the question of jurisdiction which Roxburgh J. would have taken, apart from the decided cases, would have been contrary to the conclusion at which, by force of the authorities, he felt compelled to arrive. It is right to say, therefore, that he somewhat encouraged the appeal and expressed the hope that the matter might have the consideration of this court, as it has now had. I must point out, however, that the question raised is likely to be, henceforth, in some degree academic, for the relevant statutory provisions upon which the whole argument before Roxburgh J. turned have now been superseded or repealed; attention was drawn by this court to section 1 of the Guardianship and Maintenance of Infants Act, 1951, and to section 132 of, and the Sixth Schedule to, the Magistrates' Courts Act, 1952. The joint effect of the latter two provisions is to repeal paragraphs 5 to 8 of the Second Schedule to the Emergency Laws (Miscellaneous Provisions) Act, 1947, including paragraph 6, which is a most important paragraph for the purposes of the present case: but see, however, section 53 of the Act of 1952.[3]

It is not, perhaps, to be wondered at that these various statutory changes have eluded the observation of the various persons concerned in the case. They are not easy to find; and the repeal of the relevant paragraphs of the Second Schedule to the Emergency Laws (Miscellaneous Provisions) Act, 1947, indicates the prophetic inexactitude of the heading to that schedule, which is, "Permanent enactment of provisions of "certain Defence Regulations." Neither the Guardianship and Maintenance of Infants Act, 1951, nor the Magistrates' Courts Act, 1952, was, in fact, considered by Roxburgh J., nor was his attention drawn to those Acts. Roxburgh J. considered the case on the footing that the alleged jurisdiction of the Wallington justices was founded on the provision of yet another Act, namely, section 53 of the Children Act, 1948.

Section 53 of the Children Act, 1948, together with the referential legislation to which that section gives rise, was the basis upon which the clerk to the Wallington justices advised them that they had jurisdiction. Section 53 provides: " An order " of a court of summary jurisdiction for the payment of money " under the Guardianship of Infants Act, 1886, whether made " before or after the commencement of this Act, may be enforced, " varied or revoked in like manner as an affiliation order, and the " enactments relating to affiliation orders shall apply accordingly, " with the necessary modifications." The question, as it was debated before Roxburgh J., was whether the order made by the Eastbourne justices could properly be described as " an order " of a court of summary jurisdiction for the payment of money " under the Guardianship of Infants Act, 1886." At first sight, perhaps, it does not look very like such an order, since its main object was to deal with the custody of a child; but it also contained a provision for payment of money, that is, payment by the father of 20s. per week to the mother. I add that the reference to the Guardianship of Infants Act, 1886, seems at first sight not very exact, since, in fact, the order was made by the combined effect of the Guardianship of Infants Acts, 1886 and 1925, and not by virtue of the Act of 1886 alone. I do not wish to indulge in the unprofitable and often unfair exercise of criticizing Parliamentary draftsmen. The extreme complexity of this case leads me, however, to express the hope that the statutory provisions as to these very important matters relating to children, which affect large numbers of people in relatively humble circumstances, will be made (as occasion offers) as simple and as readily understandable as possible.

---

[3] Magistrates' Courts Act, 1952, s. 53, contains the phrase "order for "the . . . payment of money" which is considered and interpreted in this decision.

Before considering whether the order made by the Eastbourne justices was an order " for the payment of money," it is necessary to consider the effect of the reference, at the end of section 53 of the Act of 1948, to " affiliation orders ": " An order " (of the kind mentioned) " may be . . . varied . . . in like manner as " an affiliation order." To discover in what manner an affiliation order may be varied, the court is thrown back in the first place to the Criminal Justice Administration Act, 1914, which was cited in the Eastbourne justices' order. That Act was, of course, concerned with a variety of subjects other than affiliation; the connexion, if any, with affiliation orders being by no means obvious on reading section 30 (3) of that Act, which provides: " Any order made either before or after the commence- " ment of this Act by a court of summary jurisdiction for the " periodical payment of money may, upon cause being shown

". . . to the satisfaction of the court, be revoked, revived, "or varied by a subsequent order." It will be noted that there is a certain similarity of language between that subsection and section 53 of the Children Act, 1948, though the similarity cannot be said to amount to an exact parallel; but both section 30 (3) of the Act of 1914 and section 53 of the Act of 1948 relate to an order of "a court of summary jurisdiction "for the payment" (in the Act of 1914, "for the periodical "payment") "of money" and provide for means of varying (inter alia) such orders.

The third relevant provision on this part of the case is paragraph 6 of the Second Schedule of the Emergency Laws (Miscellaneous Provisions) Act, 1947, which was to be "permanently" enacted, but which has now been repealed. This paragraph, which opens with the perhaps unpromising reference to provisions reproducing regulation 17 (*c*) of the Defence Regulations, provides by the first sub-paragraph: "The following "provisions shall have effect as respects complaints under sub-"section (3) of section 30 of the Criminal Justice Administration "Act, 1914, or section 7 of the Summary Jurisdiction (Married "Women) Act, 1895, as amended" (the latter provision relating to orders for payment of maintenance in matrimonial proceedings) "for the revocation, discharge, revival, alteration or variation of "an affiliation order or a maintenance order." By sub-paragraph 2: "A complaint may be made to a court of summary juris-"diction having jurisdiction in the place where the complainant "is for the time being, instead of to the court which made the "order (hereafter in this paragraph referred to as 'the original "'court')." There follow in the next two sub-paragraphs provisions designed, first, to ensure that the other party (the respondent to the complaint) should be given due notice of an application and, second, to give to the original court certain powers (on information which has to be conveyed to it) to state whether it is appropriate for the original court, rather than the court chosen by the complainant, to hear the matter. The Wallington justices were advised that their jurisdiction rested on sub-paragraph (2), and they complied, or took steps to see that other persons complied, with all the provisions of the latter sub-paragraphs.

It will be observed that if the order in question was "an order "for the payment of money" then, following the analogy directed by section 53 of the Act of 1948, it would be competent for the complainant (in this case the father) to complain, that is, apply, to the court of summary jurisdiction having jurisdiction in the place where he was for the time being. The paragraph does not say "resides," but simply "is"; and, therefore, he had to show only that at the time when he made the application he was in the place in question; and it is not in doubt, and no point has been taken to the contrary, that he "was" at a place within the Wallington justices' jurisdiction. He gave his address in making his application, and it is referred to in the order, as being 56, North Street, Carshalton, Surrey; and nobody has questioned the fact that that was within the jurisdiction of the petty sessional division of Wallington in the county of Surrey.

There still remains the question whether this was "an order "for the payment of money." It is not in doubt that it was an order containing a direction for the payment of money but, plainly it was not an order exclusively for the payment of money. It appears to me that the insertion into section 53 of the Children Act, 1948, of the phrase "for the payment of money" should have a restrictive effect on the words which precede and which follow. When I come to look (as I shall have to presently) at the jurisdiction conferred by the Guardianship of Infants Acts in matters of this kind, it is plain that they comprehend many types of order, many types of direction, other than those for mere payment of money; and treating this matter as res integra I should have formed the view that the formula "an order of a court of "summary jurisdiction for the payment of money under the "Guardianship of Infants Act may be varied . . ." indicated that the subject-matter of such orders which may be varied is that part or those parts which relate to money payments. That was plainly the view which Roxburgh J. took treating the matter as res integra. But the matter is not res integra.

No case, until the present, has come before the court where the court has been asked to consider the exact meaning of "an "order for payment of money under the Guardianship of Infants "Act." But there have been four cases, to two of which I have already made a brief reference, *Pratt* v. *Pratt*[4] and *Markham* v. *Markham*[5] (which were cases of an analogous character relating to maintenance payments under the Summary Jurisdiction (Married Women) Act, 1895), and two relating to affiliation orders which are not referred to by Roxburgh J. but which, for obvious reasons, seem to me to be, perhaps, more germane.

It will be convenient to consider the four cases in the order in which I have mentioned them, taking the maintenance cases, decided in the Divorce Division first, though these are the earliest and the latest of the four. The first was *Pratt* v. *Pratt*,[6] which came before a Divisional Court consisting of Lord Merrivale P. and Bateson J. It concerned an appeal by a husband to the Divisional Court against an order made by the justices of the Leicester City Police Court reviving a separation order which had been discharged on the ground of the wife's adultery. The only relevance of that case for this purpose is whether a separation order, the main purpose of which was to provide for the parties living separate and apart, but which contained also a direction that the husband was to pay a certain sum for the wife's maintenance, was " an order for the periodical payment of money " within the terms of the Criminal Justice Act, 1914, s. 30. It must be confessed that the point does not seem to have been closely examined or argued; but it is equally plain that the two judges treated the order as falling within the section, to which specific reference was indeed made. The argument for the husband opened with the statement that the relevant section, section 30 (3) of the Act of 1914, was inapplicable to the case. That argument was rejected, and the case, therefore, is a direct decision on that point.

---

[4] 43 T.L.R. 523.

[5] 63 T.L.R. 91.

In *Markham* v. *Markham*,[7] the second of the cases under the Summary Jurisdiction (Married Women) Act, 1895, the matter was fully considered by a Divisional Court consisting of Lord Merriman P. and Byrne J. The point arose that an order made for maintenance under the Act of 1895 had ceased to be operative because the parties had resumed cohabitation, but then the wife applied to have that order revived and also varied on the ground of persistent cruelty after the resumption of cohabitation. The question then directly arose whether the order which was sought to be revived, and which, as I have said, had contained provisions other than those of mere money payment, was an order within the terms of section 30 (3) of the Criminal Justice Act, 1914. The judgment of the President went into the matter at length, and drew attention to the two affiliation cases. He indicated plainly, as Roxburgh J. has done in the present case, that his personal view was that the order as such could not fairly be described as an order for the periodical payment of money. In that connexion he referred particularly to the language of Shearman J. in one of the two affiliation cases,[8] but he came to the conclusion that so far as his court was concerned, the Divisional

---

[6] 43 T.L.R. 523.

[7] 63 T.L.R. 91.

[8] [1926] 2 K.B. 366, 373; 42 T.L.R. 535, 537.

Court of the Probate, Divorce and Admiralty Division, he could not possibly distinguish *Markham* v. *Markham* [9] from *Pratt* v. *Pratt*,[10] and that he was bound to hold, following *Pratt* v. *Pratt*,[10] that this was an order within the terms of section 30 (3).

As I have already said, we are not here concerned either directly or by reference, with an order for maintenance under the Summary Jurisdiction (Married Women) Act, 1895, as amended. Section 53 of the Act of 1948 refers to affiliation orders. It does not, therefore, seem to me that a court which otherwise might be bound by the decisions in *Pratt* v. *Pratt* [10] and *Markham* v. *Markham* [11] need necessarily hold itself precluded by those two decisions.

The earliest of the two affiliation cases, was *Colchester* v. *Peck*,[12] a decision of a Divisional Court of the King's Bench Division, consisting of Lord Hewart C.J., Avory and Shearman JJ. (I point out for future convenience that in the report of *Markham* v. *Markham* [13] in the All England Law Reports the President is stated to be referring to "Sankey J.," meaning Shearman J.) *Colchester* v. *Peck* [14] was an affiliation order case, the headnote of which reads: "On the application of the "respondent, justices made an order in bastardy adjudging that "the appellant was the father of her illegitimate child, and "ordered him to make her a periodical payment. On a subsequent "application by the appellant," that is, the father, "under "section 30 (3) of the Criminal Justice Administration Act, 1914" the father sought a variation or revocation of that first order. The justices refused to hear the application, holding that they had no power to deal with that part of the order which adjudged the paternity; and the Divisional Court held that they were right. It is unnecessary to travel at length through the judgments, but I think that it is plain that, at any rate in so far as the application then made sought to revoke the previous order, the justices were held not to be given jurisdiction under section 30 (3) by the mere circumstance that the order adjudging the paternity was at the same time an order for payment of money. Lord Merriman P. in *Markham* v. *Markham* [15] referred to the short judgment of Shearman J. which reads [16]: "I have felt great difficulty in "thinking that the power conferred on the justices of revoking

---

[9] 63 T.L.R. 91.
[10] 43 T.L.R. 523.
[11] 63 T.L.R. 91.
[12] [1926] 2 K.B. 366.
[13] [1946] 2 All E.R. 737, 741 (see also 63 T.L.R. 91, 93, where the same mistake occurs).
[14] [1926] 2 K.B. 366.
[15] 63 T.L.R. 91, 93.
[16] [1926] 2 K.B. 366, 373.

"an order for the periodical payment of money does not include "the power to deal with the question whether or not the order "was justly made. But I am now satisfied that we are entitled "to interpret section 30 (3) of the Act of 1914, as intending that "the justices shall only deal with the periodical payment." In other words, it was his view, and the view of the court, that the qualification in section 30 (3) for periodical payment limited the jurisdiction (to revoke, vary and so forth) to that part of an order which related to money payments.

Colchester v. *Peck* [16] was decided in April, 1926. In July of the same year a similar matter was considered by this court in *Rex* v. *Copestake*.[17] The headnote reads: "After a bastardy "order had been made against the appellant by the justices in "petty sessions adjudging him to be the putative father of a "seven months child, and ordering him to pay a weekly sum, "he sought to obtain a revocation of the order under section "30 (3), of the Criminal Justice Administration Act, 1914, by "adducing fresh evidence to show that the child was a full-time "child at birth, thus placing the act of coition two months earlier "than the date alleged by the mother. The justices refused his "application:—*Held*, by the Court of Appeal, that section 30 (3), "of the Act, while giving a court of summary jurisdiction power to "revoke or vary a bastardy order made by it so far as that order "related to periodical payments, conferred no jurisdiction on that "court to revoke the order so far as it contained an adjudication "of paternity," and this court approved the decision in *Colchester* v. *Peck*.[18] I think that the effect of the decision is correctly summarized in the headnote and I need not, therefore, refer further to the judgments.

It is true, as Mr. Hoare pointed out, that in an affiliation order, apart from the actual adjudication of paternity, the only order that can be made is for the payment of money; and he said that all that *Colchester* v. *Peck* [18] and *Rex* v. *Copestake* [19] decided was that section 30 (3) did not give the right to apply to another court of summary jurisdiction to revoke the *adjudication* as regards paternity, as distinct from revoking or varying the *order* as to payment of money. Mr. Hoare, therefore, distinguishes those two cases from the present; for here there is no question of "adjudication." The "order" of the Eastbourne justices consists of a series of "orders," that is, directions relating to custody, to money payments, and to access; and he says that when the

---

[16] [1926] 2 K.B. 366.
[17] [1927] 1 K.B. 468.
[18] [1926] 2 K.B. 366.
[19] [1927] 1 K.B. 468.

C. A.
1953

DANKBARS, *In re.*

Evershed M.R.

analogy of the Criminal Justice Administration Act, 1914, is applied, as required by section 53 of the Act of 1948, there is no such limitation as there is with regard to affiliation orders, but that the section may be invoked to obtain a revocation or variation of any part of such an "order," whether it is the part which is strictly concerned with money payments or (as in the present case) the part dealing with access; and Mr. Hoare, of course, cites the view of the Divisional Court of the Probate, Divorce and Admiralty Division as shown by *Pratt* v. *Pratt* [20] and *Markham* v. *Markham*.[21]

In the circumstances which will presently appear it is not strictly necessary for this court to decide this particular matter. It is obviously open to Mr. Hoare to justify his claim that the Wallington justices had jurisdiction on any ground, whether under this section (which was the one particularly invoked) or otherwise, but, as at present advised, I am bound to say that I cannot accept Mr. Hoare's argument. I do not wish to suggest or to state that *Pratt* v. *Pratt* [22] and *Markham* v. *Markham* [23] ought to be treated as wrongly decided. *Pratt* v. *Pratt* [24] has now stood for over a quarter of a century; and we have not considered all the detailed provisions in the Summary Jurisdiction (Married Women) Act, 1895, and the amending statutes. There may be particular matters in those statutes which would give rise to different or special considerations. But so far as this matter is concerned, and so far as orders made under the Guardianship of Infants Acts are concerned, I take the view that section 53 of the Children Act, 1948, by including the reference to orders "for "payment of money," meant to limit the jurisdiction there conferred to that part of the order which was concerned with money payment, and the specific reference to affiliation orders (for Parliament must have had in mind in making that reference the interpretation contained in *Colchester* v. *Peck* [25] and *Rex* v. *Copestake* [26]) leads me to conclude that that limitation ought to be observed in the Guardianship of Infants Act cases. It is no doubt true that orders for money payment are often very closely intermingled with other provisions, and it may well be that the power to vary should not be so limited as to prevent a court varying not only the money payment but other provisions which may fairly be treated as being merely ancillary to money payment.

---

[20] 137 L.T. 491; 43 T.L.R. 523.

[21] 63 T.L.R. 91.

[22] 137 L.T. 491.

[23] 63 T.L.R. 91.

[24] 137 L.T. 491.

[25] [1926] 2 K.B. 366.

[26] [1927] 1 K.B. 468.

But that consideration would not help Mr. Hoare in the present case. On any view of this matter there are inescapable inconveniences, so far as I can see; so much so that I was unmoved by Mr. Hoare's references in Maxwell on Interpretation of Statutes (10th ed., pp. 191, 229) to the argumentum ab inconvenienti. For, if Mr. Hoare is right, it seems strange that jurisdiction to vary an order as to access would depend on whether the order happened to contain an order of some sort for somebody to pay some money to somebody else.

I need not, however, pursue that matter further. During the course of the argument my brother Jenkins drew the attention of counsel to the provisions of section 1 of the Guardianship and Maintenance of Infants Act, 1951. The long title of that Act, which is of considerable length, opens with these words: "An "Act to extend jurisdiction under the Guardianship of Infants "Acts, 1886 and 1925, to certain county courts and courts of "summary jurisdiction." Subsection (1) of section 1 provides (so far as relevant): "Subject to the following provisions of this "section, the expression 'the court', for the purposes of the "Guardianship of Infants Acts, 1886 and 1925, means in England "and Wales the High Court or the county court of the district, "or a court of summary jurisdiction having jurisdiction in the "place, in which the respondent or any of the respondents or "the applicant or the infant to whom the application relates "resides." Unless that subsection only applies as regards the first application and is a means of defining what is called in the Emergency Laws Act "the original court," it would appear that if an application to vary is made to a court of summary jurisdiction having jurisdiction in the place where the applicant resides at the time he makes his application, that court would have jurisdiction.

[His Lordship referred to the evidence of the father that at the time of the application he was living only temporarily at Cardiff, and concluded:] Taking the evidence as a whole, it seems to me that this court can, and should in this case, infer that Mr. Dankbars was "residing," in the ordinary commonsense meaning of that phrase, at 56 North Street, Carshalton, at the time when he made his application. I am, therefore, of opinion that (subject to the one point already indicated) the father being so resident, the Wallington justices had jurisdiction by virtue of section 1 of the Guardianship and Maintenance of Infants Act, 1951.

By section 5 of the Guardianship of Infants Act of 1886 it is provided: "The court may, upon the application of the mother of "any infant . . . make such order as it may think fit regarding the "custody of such infant and the right of access thereto of either "parent . . . and may alter, vary, or discharge such order on the "application of either parent." By section 9, the interpretation section: "In the construction of this Act the expression 'the "'court' shall mean—in England the High Court or the "county court of the district in which the respondent or "respondents or any of them may reside." The statutory jurisdiction to make application for access, and so forth, is limited to the mother, though by section 5 it is provided that an order to vary may be made on the application of either parent. But there is, it will be observed, no provision for money payments in the Act of 1886; and the court is so far limited in any case to the High Court and the county court. But I interpret section 5 and section 9 together (so far as relevant) in this way; that, for the purposes of varying an order, the county court of the district in which the respondent or respondents or any of them may for the time being reside has jurisdiction. In other words, I interpret section 5 as conferring jurisdiction on the appropriate court to vary an order, that appropriate court not being necessarily the "original" court, videlicet the court which made the original order sought to be varied. The Act of 1925 filled in, so to speak, certain of the gaps which I have just indicated in the jurisdiction conferred by the Act of 1886. Thus, section 3 (2) provides: "Where the court under the said section as so amended makes "an order giving the custody of the infant to the mother, then, "whether or not the mother is then residing with the father, the "court may further order that the father shall pay to the mother "towards the maintenance of the infant such weekly or other "periodical sum as the court, having regard to the means of the "father, may think reasonable." That introduces the power to make money payments. Subsection 4 provides: "Any order so "made may, on the application either of the father or the "mother of the infant, be varied or discharged by a subsequent "order." Section 7 of the Act of 1925 amends the interpretation provisions of section 9: "For the purposes of the Guardianship "of Infants Act, 1886, as amended by this Act, the expression "'the court' shall include a court of summary jurisdiction." There is also a power to make rules, but I think that nothing of assistance is to be derived from the rules.

On my interpretation, up to 1925, therefore, jurisdiction was given, in relation to applications to vary an order, to, among other courts, a court of summary jurisdiction having jurisdiction in a place where a respondent for the time being (that is, at the time of the application) might reside. That jurisdiction, of course, would not extend to the complaint in this case since the father was the applicant and not the respondent. But that exclusion was, in my judgment, dealt with by section 1 of the Act of 1951, which gives jurisdiction to the court, not only where the respondent resides, but also to the court where the applicant resides. Reading that last-mentioned section together with the earlier legislation to which I have referred, I am unable to construe section 1 (1) of the Act of 1951 as being limited to "the original "court" in the sense in which I have used that phrase. I think, therefore, that any court, the jurisdiction of which from time to time can be invoked by the residence qualification in that section, has power to make a variation order contemplated by the original section 5 of the Act of 1886 as amended and expanded.

The result, therefore, is that inferring as a fact, as I do, the necessary residence qualification, the Wallington justices had jurisdiction, not indeed by virtue of section 53 of the Act of 1948 (for I do not express a final conclusion on that section and I do not desire to base the jurisdiction on that section) but rather on section 1 of the Act of 1951.

In my judgment, the appeal, therefore, fails and must be dismissed.

JENKINS L.J. I agree both on the question of jurisdiction and as to the merits of the case, and I find nothing that I can usefully add to the reasons which my Lord has given for concluding that this appeal fails and should be dismissed.

MORRIS L.J. I also entirely agree with the reasoning and the conclusions expressed in the judgment of the Master of the Rolls, and I do not feel that I can usefully add anything.

Appeal dismissed.
Costs on each side to be taxed under Legal Aid and Advice Act.

Solicitors: *Haslewood, Hare, Shirley Woolmer & Co. for Mayo & Perkins, Eastbourne; Warmingtons.*

E. D.

INLAND REVENUE COMMISSIONERS *v.* UNIVERSAL GRINDING WHEEL CO. LD.

C. A.

1953
Nov. 26, 27.

Singleton,
Birkett and
Hodson L.JJ.

Revenue—Profits tax—Company—Preference shares redeemed at a premium—Premium not a "distribution" for purposes of profits tax—Sum applied in reducing share capital—Finance Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 35), *s.* 36 (1), *proviso.*
"Applied." Company.

Section 36 (1) of the Finance Act, 1947, defines the meaning of a "distribution" for the purpose of profits tax, and the proviso to the subsection states: "Provided that no sum applied in . . . "reducing the share capital of the person carrying on the trade or "business shall be treated as a distribution."

The £1 preference shares of a company were, by the company's articles of association, redeemable at 27s. In 1947 the shares were redeemed at that figure, the 7s. premium being paid out of profits as required by the articles and by section 46 of the Companies Act, 1929. The company was assessed to profits tax on the 7s. premium on the basis that it was a "distribution" for the purpose of that tax within the meaning of section 36 (1) of the Finance Act, 1947.

The company contended that the 7s. was a sum "applied" in reducing the share capital of the company and was, therefore, excluded by the proviso to section 36 (1) from being treated as a distribution:—

Held (*per* Singleton and Birkett L.JJ., Hodson L.J. dissenting), that a company could reduce its share capital by redeeming its preference shares if authorized by its articles to do so; that in the present case the company was bound by its articles to pay 27s. for every £1 of nominal capital reduced; and that, therefore, the premium of 7s. a share was "applied" in reducing the share capital within the meaning of the proviso to section 36 (1) of the Finance Act, 1947, and was not a distribution for the purpose of profits tax.

Per Hodson L.J. No sum in excess of £1, the full nominal value of the shares redeemed, could accurately be described as having been "applied" in reducing the share capital. The amount of the reduction of the capital was limited by the amount of the capital itself, and any sum in excess of £1 was "applied," not in reduction of the capital, but as the price of redemption of the shares.

Decision of Upjohn J. [1953] Ch. 499; [1953] 3 W.L.R. 29; [1953] 2 All E.R. 133 affirmed.

Appeal from Upjohn J.[1]

The Crown appealed from the decision of Upjohn J. dismissing an appeal by the Crown by case stated by the Commissioners for the Special Purposes of the Income Tax Acts, who had dismissed

---

[1] [1953] Ch. 499; [1953] 3 W.L.R. 29; [1953] 2 All E.R. 133.

C. A.
1953

INLAND REVENUE COMMISSIONERS
v.
UNIVERSAL GRINDING WHEEL CO. LD.

an assessment to profits tax on the respondent company in respect of 7s. premium paid on each £1 preference share redeemed by the company.

The respondent company, the Universal Grinding Wheel Co. Ld., was incorporated on March 8, 1935, with a nominal capital of £600,000 divided into 400,000 5 per cent. cumulative participating preference shares of £1 each and 400,000 ordinary shares of 10s. each.

By article 8 (D) of the articles of association provision was made in accordance with powers given by section 46 of the Companies Act, 1929, for the redemption of the preference shares at the price of the nominal amount of the share plus a premium of 7s. per share, together with certain other sums relating to any deficiency of dividend not here relevant. In 1947 the company redeemed those preference shares, the redemption being carried out in part by an issue of new capital and in part out of profits available for dividend. In particular, the premium of 7s. was paid out of such profits, as required by section 46 of the Act of 1929 and by the company's articles of association.

The question for determination on the case stated was whether, for the purposes of the proviso to section 36 (1) of the Finance Act, 1947,[2] the company had applied, as the Crown

---

[2] Finance Act, 1947, s. 30 (1): "Subject to the provisions of this "Part of this Act—(*a*) the profits tax "to be charged for any chargeable "accounting period on the profits of "a trade or business shall be of an "amount equal to twelve and a half "per cent. of the profits."

Subs. (2): "Subject to the provi-"sions of this Part of this Act, if, "in the case of any trade or business, "the net relevant distributions to "proprietors (as defined in the subse-"quent provisions of this Part of this "Act) for any chargeable accounting "period are less than the profits "thereof for that period chargeable to "the profits tax, the amount charge-"able by way of the profits tax in "respect of that period shall be "reduced by an amount equal to "seven and a half per cent. of the "difference."

S. 34 defines "the net relevant dis-"tributions" to proprietors.

Subs. (2): "The net relevant dis-"tributions to proprietors for any "chargeable accounting period of a "body corporate, society or other body "are so much of the gross relevant "distributions to the proprietors for "that period of that body corporate, "society or other body (as defined "by the next succeeding section) as "bears to the whole of the said gross "relevant distributions the same pro-"portion that the profits of that period "bear to the profits therefor computed "without abatement and including "franked investment income."

S. 35 (1): "Subject to the provi-"sions of this and the two next suc-"ceeding sections, the gross relevant "distributions to proprietors for any "chargeable accounting period of a "body corporate, society or other "body, are the total distributions to "the members of the body corporate, "society or other body, not being dis-"tributions allowable as deductions in "computing the profits of the trade or "business for any period for the pur-"poses of the profits tax, and being "either— . . . (*c*) in the case of contended, 20s., or, as the company said, 27s., in reducing each £1 nominal share of its preference capital.

The Special Commissioners decided in favour of the company. They were of opinion that the redemption of the 400,000 preference shares was simply a way of reducing the share capital of the company. In order to reduce the share capital in that way the company had to apply, and did apply, 27s. in payment for each share. They held, therefore, that the full amount representing 27s. per share was applied in reducing the share capital of the company within the meaning of the proviso to section 36 (1) of the Act.

Upjohn J. held that the decision of the Special Commissioners was right. The Crown appealed.

The facts are more fully stated in the judgment of Singleton L.J.

Montgomery White Q.C., *J. H. Stamp* and *Sir Reginald Hills* for the Crown. The only question raised by this case is whether, as held by the Special Commissioners and Upjohn J., the premium of 7s. which had to be paid by the company in order to redeem its 20s. preference shares was " applied " in reducing the share capital of the company within the meaning of the proviso to section 36 (1) of the Finance Act, 1947. It is agreed that 20s. of the total amount paid was so applied, but it is submitted that the 7s. premium was not, because it is not possible to apply in reduction of capital a larger sum than the nominal

---

" the last chargeable accounting period " in which the trade or business is " carried on, so much of any distribution made after the end of that " period (not being a distribution to " which paragraph (*a*) of this subsection applies) as is not a distribution " of capital, and, for the purposes of " paragraph (*c*) of this subsection, the " distributions which are to be treated " as distributions of capital shall not, " in the case of distributions made " by a body corporate with a share " capital, exceed an amount equal to " the total nominal amount of the " paid-up share capital thereof together, where the body corporate has " issued shares at a premium for cash, " with the aggregate of the amounts " of the premiums."

S. 36 (1): " Subject to the provisions of the next succeeding subsection, wherever—(*a*) any amount " is distributed directly or indirectly " by way of dividend or cash bonus " to any person; or (*b*) assets are distributed in kind to any person; or " (*c*) where the trade or business is " carried on by a body corporate " the directors whereof have a controlling interest therein, an amount " is applied, whether by way of " remuneration, loans or otherwise, for " the benefit of any person, there shall " be deemed for the purposes of the last " preceding section to be a distribution " to that person of that amount or, " as the case may be, of an amount " equal to the value of those assets: " Provided that no sum applied in " repaying a loan or in reducing the " share capital of the person carrying " on the trade or business shall be " treated as a distribution."

value of the shares of the company, which would be the case if the 7s. were held to be "applied." There is all the difference in the world between applying a sum in redemption of preference shares and in the reduction of the capital of the company, and the proviso to section 36 (1) only relates to the latter transaction. The 20s. in the present case was paid by way of reduction of capital and the 7s. as a premium which would appear in the company's books as a reduction on the profit and loss account, since by section 46 of the Companies Act, 1929, such a premium must be paid out of profits; and under the Finance Act, 1947, no relief is allowed on a distribution out of profits. The decision of the Special Commissioners and of Upjohn J. was, therefore, wrong and the sum in question was properly assessable to profits tax. [Reference was made to *Trevor* v. *Whitworth.*[3]]

Roy Borneman Q.C. and *Gordon Richardson* for the respondent company. The decision reached by the Special Commissioners and affirmed by Upjohn J. was right. The words in the proviso to section 36 (1) which have to be construed are quite simple, but what the argument for the Crown invites the court to do is to ignore the ordinary meaning of the words in the proviso and to construe them in accordance with the construction which the Crown desires to put on them. The Act of 1947, being a taxing statute, must be construed strictly, and the court should not be asked to consider any policy or scheme which may be suggested as being its object. It is submitted that it makes no difference for the purpose of the proviso how the sum of 27s. paid for the preference shares in the present case was made up. The only question is what amount was "applied" in reducing the capital of the company?, in other words, what did it cost to make the reduction? The answer is 27s. a share, and the amount "applied" included both the 20s. and the 7s. On a simple interpretation of the words of the proviso it cannot be said that the 27s. was other than the cost of reducing the share capital, and if that is so it was "applied" within the meaning of the proviso. In *In re Serpell & Co. Ld.*[4] Uthwatt J. held that when preference shares were redeemed the effect was not merely to extinguish them as issued capital and paid up capital, but also to get rid of them entirely as part of the nominal capital of the company.

If the plain words of the proviso are to be interpreted in the manner suggested by the Crown it would involve the straining of the language used and possibly the addition by implication of additional words, and it is no part of the function of the court to add words to a statute. The words used are " applied in reducing " the share capital." On the authorities, the redeeming of preference shares is reducing capital. The company paid 27s. a share to redeem its shares, which was a way of reducing capital, and therefore it " applied " the 27s. in reducing its capital and is afforded the protection provided by the proviso.

---

[3] (1887) 12 App.Cas. 409; 3 T.L.R. 745.

[4] [1944] Ch. 233; 60 T.L.R. 309.

Montgomery White Q.C. replied.

SINGLETON L.J. The Universal Grinding Wheel Co. Ld. was incorporated on March 8, 1935, with a nominal capital of £600,000, divided into 400,000 5 per cent. cumulative participating preference shares of £1 each and 400,000 ordinary shares of 10s. each. The capital at the material time was fully paid.

The preference shares, under clause 7 (B) of the articles, were entitled to participate to the extent that they might receive a dividend of 8 per cent. In, or before, the year 1947, it was decided by those responsible for the government of the company that it would be good policy to redeem the preference shares. That involved a consideration of the articles of association, and in particular of clause 8, which deals with the redemption of 5 per cent. cumulative participating preference shares, and it also brought into the forefront section 46 of the Companies Act, 1929. That section enabled a company to issue preference shares redeemable at the option of the company, and subsection (1) (*d*) provided that " where any such shares are redeemed out of the " proceeds of a fresh issue, the premium, if any, payable on " redemption, must have been provided for out of the profits " of the company before the shares are redeemed." In order to redeem the preference shares the company made a fresh issue of the like nominal amount, and it follows from what I have said that any premium which had to be paid, had to be paid out of the profits of the company.

Clause 8 of the articles provided: " The 5 per cent. cumulative " participating preference shares when fully paid up shall be " liable to redemption at the option of the company in accordance " with the following provisions . . . (D) The redemption price " of a redeemable preference share shall be the nominal amount " of the share plus a premium of 7s. per share and a sum equal " to all (if any) arrears or deficiency of the fixed cumulative dividend (less tax) and the current fixed cumulative dividend (less " tax) calculated down to the date of repayment of capital. . . ."

C. A.
1953

INLAND REVENUE COMMISSIONERS v. UNIVERSAL GRINDING WHEEL CO. LD.

Singleton L.J.

The 5 per cent. cumulative participating preference shares could thus be redeemed by the company on payment of 27s. a share. In the result, the holders of 5 per cent. cumulative participating preference shares were paid the sum of 27s. in respect of each £1 preference share, and of that sum 20s. was provided by the new issue and 7s. was found from the profits of the company in accordance with the provisions of section 46 of the Companies Act, 1929.

The Finance Act, 1947, by Part IV, brought into operation the profits tax. The relevant provisions are to be found in sections 30–36 of the Act. The tax was a tax on the profits of the trade or business, but if the net relevant distributions to the proprietors were less than the profits, the amount chargeable by way of profits tax was to be reduced by 7½ per cent.:—see section 30. Sections 35 and 36 deal with distribution to proprietors. Putting it quite generally, section 35 provides that the gross relevant distributions to the proprietors are the total distributions to the members of the company, being either "(*a*) dividends declared not later than six months after the end "of that period . . . or (*b*) distributions (other than dividends "which, under paragraph (*a*) of this subsection, are to be treated "as part of the gross relevant distributions to proprietors for any "previous chargeable accounting period) made in the period."

It is on section 36 (1) that this appeal depends. That subsection provides: "Subject to the provisions of the next "succeeding subsection, wherever—(*a*) any amount is distributed "directly or indirectly by way of dividend or cash bonus to any "person; or (*b*) assets are distributed in kind to any person " . . . there shall be deemed for the purposes of the last pre"ceding section to be a distribution to that person of that amount "or, as the case may be, of an amount equal to the value of "those assets: Provided that no sum applied in repaying a loan "or in reducing the share capital of the person carrying on the "trade or business shall be treated as a distribution."

The case for the Crown is that the 7s. a share was a distribution under section 36 (1) (*a*) or (*b*), and that it is a matter for assessment of profits tax under the Act. The case for the company is that the proviso to section 36 (1) clearly takes the payment out of that category; in other words, it was a sum applied in reducing the share capital of the company. That, really, is the sole point in the case. The decision of Upjohn J. was in favour of the company.

The company wished to reduce its capital by wiping out its

5 per cent. cumulative participating preference shares. It could only do that by the application of clause 8 of its articles. If there had been an application to the court to reduce the capital by redeeming the preference shares, the answer would have been "You need not come here; you have agreed the terms on which "you can do it." Thus it was necessary for the company to pay each £1 preference shareholder the sum of 27s., and that the company did. The redemption of preference capital is equivalent to a reduction of capital. That, so it seems to me, was the view of Uthwatt J. expressed in *In re Serpell & Co. Ld.*[1] One way of reducing the capital of the company was to redeem the preference shares, and the company, in accordance with its powers, did so. In order to do that the company had to pay 27s. a share, and it is claimed on behalf of the company that the sum so paid was a sum applied in reducing the share capital of the company, and so within the proviso to section 36 (1) of the Finance Act, 1947.

It is agreed on both sides that the question for the court is, "What amount did the company 'apply' to reduce its capital?"

The contention put forward by Mr. Montgomery White and Mr. Stamp for the Crown is that the amount applied to reduce the capital of the company was only £1 a share; and that the 7s. was in the nature of a conditional payment, that it came out of profits, and that it was not a sum (or part of a sum) applied in reducing the share capital.

In the course of the argument I suggested that the proviso might have had words added which would make it read in this way: "Provided that no sum applied in reducing the share "capital of the person carrying on the trade or business shall be "treated as a distribution, except in so far as the sum so applied "exceeds the nominal amount of the share capital repaid." In the absence of any such words I find difficulty in agreeing with the submission made on behalf of the Crown, especially in view of the reference to the nominal amount of the capital in section 35. We are concerned solely with a question of construction. It seems to me that the word "applied" in the proviso to section 36 (1) has the same meaning as "paid." The company could not redeem the preference shares unless they paid 27s. a share to the holders of those shares. In paying that amount they were applying it to redeem the preference shares and in reducing the share capital of the company; thus the sum

---

[1] [1944] Ch. 233; 60 T.L.R. 309.

C. A.

1953

INLAND REVENUE COMMISSIONERS v. UNIVERSAL GRINDING WHEEL CO. LD.

Singleton L.J.

which they paid was applied in reducing the capital of the company, and does not fall to be treated as a distribution.

The view which I have formed is, I think, supported by reference to section 35 (1) (*c*) of the Finance Act, 1947, where there is reference to the " nominal amount of the paid-up share " capital " of the company. And I refer also to section 71 of the Companies Act, 1947, which Act received the Royal Assent a week after the Finance Act. It is not necessary to read those sections, for I have formed the view that this appeal depends on the construction of the proviso to section 36 (1) of the Finance Act, 1947.

I agree with the judgment of Upjohn J. and I am in favour of dismissing the appeal.

BIRKETT L.J. The question which arose on this appeal was not susceptible of any prolonged argument, and counsel on either side found themselves coming back time after time to the construction of the proviso to section 36 (1) of the Finance Act, 1947. There were no cases which were directly in point. The matter had never been the subject of any judicial decision, and just as the argument was not susceptible of much elaboration, so the judgment must be, I think, necessarily short, particularly in view of the fact that my Lord has already cited all the relevant sections of the relevant Acts, and has stated the reasons why he has come to his conclusion.

The proviso to section 36 (1) appears in Part IV of the Act, headed " Profits Tax," but I think that one must be careful not to seek to find what was the intention of the legislature in these particular sections and then, having done so, to make the construction of the proviso accord with that presumed intention. It is relevant to consider, as my Lord did consider, the relation of section 35 (1) (*c*) where the words, are, " in the case of the " last chargeable accounting period in which the trade or business " is carried on, so much of any distribution made after the end " of that period (not being a distribution to which paragraph (*a*) " of this subsection applies) as is not a distribution of capital, " and, for the purposes of paragraph (*c*) of this subsection, the " distributions which are to be treated as distributions of capital " shall not, in the case of distributions made by a body corporate " with a share capital, exceed an amount equal to the total " nominal amount of the paid-up share capital thereof together, " where the body corporate has issued shares at a premium for " cash, with the aggregate of the amounts of the premiums."

It was suggested in the course of the argument—and I gather that it was suggested in the court below—that what was really needed to establish the case for the Crown was the addition of some words to the proviso which are not there at the moment. Mr. Montgomery White, naturally, disclaimed any such intention, and relied upon the plain meaning of the words.

I think, therefore, that, without cases to guide us, it is necessary to take a view one way or the other on the construction of this proviso, and I myself have come to my own conclusion upon the construction to be given to it. The company redeemed its redeemable preference shares, as it was fully entitled to do, under article 8 of the articles of association, paragraph (D) of which reads, " The redemption price of a redeemable preference " share shall be the nominal amount of the share plus a premium " of 7s. . . .," and various other matters which do not come into this case.

On deciding to redeem the shares, the company's obligation was to pay 27s. per share. It is true that in this particular case it is possible to split up the 27s., and, indeed, it is necessary to do so for this reason: 20s. of the 27s. could properly be paid by means of a new issue, but no more. The 7s., by section 46 (1) of the Companies Act, 1929, must come from profit. Section 46 (1) of the Companies Act, 1929, provided that " no such shares " shall be redeemed except out of the profits of the company " which would otherwise be available . . ."; and under paragraph (*d*) it provides: " Where any such shares are redeemed out " of the proceeds of a fresh issue, the premium, if any, payable " on redemption, must have been provided for out of the profits " of the company before the shares are redeemed." So it was possible, and necessary, to divide this 27s. into 20s. out of the new issue and 7s. out of the profits; but it was in fact 27s. in all. In my view, it does not matter for the purposes of this case that it was necessary to split the 27s. in that way, but the argument for the Crown was that in fact only 20s. had been " applied " within the meaning of the proviso, in the reduction of capital, because the capital was £400,000, and when 20s. had been paid for each share £400,000, would be reached. Therefore, anything else which was paid above and beyond the 20s. was not " applied " in reduction of capital. It was suggested that the sum of 7s. was paid or applied for something else; for example, as an inducement to the preference shareholders to consent to the redemption; but it was pointed out—and it is clear from the articles—that the company already had such permission. However, it was said that, whether that was right or not, the 7s. clearly was not applied in reduction of capital; it was over and above the amount required for the repayment of the £400,000.

The company, on the other hand, contended that the *only* way open to them to get rid of the 400,000 redeemable preference shares was to repay on the terms which were laid down in the articles; and that the preference shareholders, who had subscribed for the shares on the faith of the statement that if redeemed they would be redeemed at 27s., were entitled to 27s. Nobody disputes that. The only point in dispute is whether, if the redeemable preference shares are redeemed at 27s., only 20s. of that amount may be properly said to be applied in the reduction of the capital. The company say that they were reducing their capital, namely, the 400,000 redeemable preference shares, and the only way in which they could do that was to pay what they had pledged themselves to pay, namely, 27s. The company also said that it made no difference for the purpose of this appeal that they had to pay the 27s. in the manner I have detailed—20s. by means of the new issue and 7s. out of the profits because of the provisions of the Companies Act. The material fact for this appeal is that they *had to pay* 27s.

Dealing with the section relating to profits, when it is said in the proviso to section 36 (1), " Provided that no sum applied " in . . ."—and much insistence was laid upon the word " in "— " . . . reducing the share capital of the person carrying on the " trade or business shall be treated as a distribution," the company contend that it makes no difference that one is able to split up the sum of 27s.; that was the sum which they paid and the sum they applied.

If there is any distinction between the word " paid " and the word " applied " in this section, it must be that the sum of 20s. was applied and the extra 7s. was paid. But if the sum of 27s. is paid to rid oneself of a 20s. share, I should have thought, the English language being what it is, that the 27s. was applied for that purpose; and the company therefore say that it is not a question of what is the nominal capital which has been reduced. Nobody doubts it is £400,000, but to reduce that sum they *had to pay*, and did pay, 27s. for every 20s. share, and therefore they applied the sum of 27s.

The mere recital of the amount of the nominal capital does not lead one anywhere at all, because this particular proviso says nothing about nominal capital. My Lord has pointed out the distinction between section 35 and section 36. The latter says nothing about nominal capital. It says in the plainest terms "provided that *no sum* applied in reducing the share capital shall "count as a distribution."

The first question is, therefore: is the amount in question a sum? There is no doubt about that. The second question is: was it "applied"? I think it is clear beyond contradiction that it was applied. The third question, which is the vital question, is: was it applied in reducing the share capital? I am bound to say, having thought a good deal about it, that I cannot see any particular virtue in the word "in," in the phrase "in reducing "the capital." Supposing it had been, "in order to reduce the "capital" or "for the purpose of reducing the capital." I cannot think that there is any clear or vital distinction in the use of the word "in." If it were contended that that word impliedly means nominal capital, that would be a different thing; but I do not think that it does. Therefore, ultimately, the simple question —though I freely admit it is capable of various answers—is this. The company are entitled to ask, and the court, I think, should ask, "In reducing this block of 400,000 £1 redeemable preference "shares, what has been the cost to the company?" The plain answer to that question, if it be the right question, is 27s. for every 20s. share.

If it is put in the way, "What has the company paid in order "to reduce that capital?", the answer clearly is that it has paid 27s. for every 20s. share. If the question is, "What sum has "the company applied in reducing the 400,000 £1 redeemable "preference shares?", the answer again is 27s. for every 20s. share.

I fully appreciate the argument which was addressed to us by Mr. Montgomery White and Mr. Stamp upon this matter, namely, that what the company were doing by this operation was not really an operation to reduce the capital, but an operation properly described as one of redeeming the redeemable preference shares. In my opinion no such distinction can properly be made. The two things are inextricably intertwined; they are really indivisible. For, by the very act of redeeming the preference shares, the company was in fact reducing the capital.

Without entering into any question of what the intention of the legislature might have been, but applying, as I think we should, the plain words of the proviso to the admitted facts of this case, I come to the same conclusion as Upjohn J. and the Special Commissioners. What was done was to reduce the capital by redeeming the preference shares. That could only be carried out by paying 27s. for every 20s. share, and the 27s. was, therefore, a sum "applied" in the reduction of the capital of the company; and that being so, I agree that this appeal ought to be dismissed.

HODSON L.J. I have the misfortune to differ both from my Lords and also from the judge from whom this appeal is brought, but since I have come to a clear conclusion on this matter it is my duty to express it.

In December, 1947, the respondent company redeemed 400,000 preference shares of £1 each at the price of 27s. per share. This was done pursuant to the articles of association of the company, in accordance with the powers given by section 46 of the Companies Act, 1929, for the redemption of preference shares. The redemption was carried out in part by an issue of new capital and in part out of profits available for dividend. In particular, the premium of 7s. per share was paid out of profits as required by section 46 of the Companies Act, 1929, and by the articles of association of the company.

Prima facie, the distribution of 27s. a share was a distribution for the purposes of the Finance Act, 1947. The company contends that the proviso to section 36 (1) of the Act takes it out of the definition contained in the section. The proviso is in these terms: "Provided that no sum applied in repaying a loan or in "reducing the share capital of the person carrying on the trade "or business shall be treated as a distribution."

The sum of 20s. per share was clearly applied in reducing the share capital, and the sole question is whether or not, having regard to the language of the proviso, the extra sum of 7s. is to be treated as a distribution. The company said that the 27s. had, in fact, been applied in reducing the capital, and in no other way. It was said that this is the plain effect of the wording of the proviso, and that the force of the language cannot be resisted in the absence of a proviso to the proviso on these lines: "Except "in so far as the sum applied exceeds the nominal amount of the "share capital repaid." In support of the argument the company contended that the redemption of preference shares was equivalent to the reduction of capital, or, alternatively, the redemption of shares was a way of reducing capital.

I am unable to accept these contentions of the company. I would emphasize—because I think it is important—that, as the Crown pointed out in argument, the words of the proviso are "in "reducing," not "for the purpose of reducing," nor "in connexion with reducing," nor "on reducing." As a matter of arithmetic the maximum sum which can be applied in reduction of the capital is the amount of the capital itself, namely, £1 per share. The additional sum of 7s. per share is a sum which the company was pledged to pay to the shareholders because of the redemption provision contained in the articles, and cannot, in my opinion, be regarded as a sum applied in reduction of capital. It is not in itself a reduction, whether it be regarded as a term or condition upon which a reduction can be effected or an inducement to shareholders to persuade them to submit to a reduction of capital. The word "reduction" is not synonymous with "redemption," although it is true that the result of redemption is to reduce the capital of the company.

The company was constrained to argue that in construing the words "no sum applied in reducing the share capital" the question to be posed was "What is the cost of redemption?" The answer being 27s. per share, it was said that this is the sum applied. I cannot read the word "sum" as equivalent to "the cost of "redemption." The sum which is under consideration is the sum to be applied in reduction of the capital. This sum cannot exceed the amount of the capital, whereas the cost of redemption would include sums which are not applied in reduction of capital —for example, not only the premium in question, but the costs of stockbrokers and solicitors incurred in connexion with the redemption.

The matter may; I think, be conveniently explained by reference to the company's balance sheet. In so far as the company's capital is reduced from its nominal value to zero this can be done by reducing the capital figure on the left side of the balance sheet, but in so far as a sum is to be applied in excess of the nominal value of the capital it is necessary to draw on the balance of profit and loss item. The additional sum is not reduction of capital, but a reduction of the reserve of profits or the profits carried forward.

Some reliance was placed on the difference between the terms of section 35 (1) (*c*) and those of the proviso to section 36 (1) of the Finance Act, 1947. Section 35 (1) (*c*) is concerned with the distribution to shareholders on the liquidation of a company, and provides for the return of capital to shareholders, and excludes from relief any excess over capital. The material words are, "for "the purposes of . . . this subsection, the distributions which "are to be treated as distributions of capital shall not, in the "case of distributions made by a body corporate with a share "capital, exceed an amount equal to the total *nominal* amount "of the paid-up share capital thereof together, where the body "corporate has issued shares at a premium for cash, with the "aggregate of the amounts of the premiums." Reliance is placed on the adjective "nominal" before the word "amount," contrasted with the absence of this adjective before the words "share "capital" in the proviso under consideration. I cannot see that this argument reinforces the contention of the company. In the first place, section 35 (1) (*c*) is dealing with a company winding up and distributing its assets, whereas section 36 (1) is dealing with the balance sheet position of a company which is in being as an operating concern. Moreover, if the word "nominal" were included before the words "share capital" in the proviso to section 36 (1), the same arguments would have been open to the company as have been addressed to the court in this case on the wording as it stands.

The language of section 35 (1) (*c*) does not, in my view, support the argument for the company. On the other hand, it lays the foundation for the comment that, in dealing with the return of capital on a winding up, shares issued at a premium for cash are specifically mentioned as a legitimate addition to the capital of the company for the purpose of arriving at the excess distribution. Logically one would expect to find the same position in considering sums applied in reduction of capital under the proviso to section 36 (1).

A further supporting argument was sought to be derived from the proposition that a redemption of shares was equivalent to the purchase of shares by the company, and that a company which purchased its own shares thereby reduced its capital.

Reliance was placed on passages from the speeches in *Trevor* v. *Whitworth.*[2] That case was decided in 1887 before redeemable preference shares were authorized by the Companies Act, 1929, and the actual decision in that case was that a company had no power under the then Companies Acts to purchase its own shares, and that the purchase was therefore ultra vires.

It was said, relying on those passages, that the company had had to apply 27s. per share in the purchase of its shares, and had thereby reduced its capital. I confess that I derive no assistance from this argument, which leaves the question to be answered exactly as it was, that is to say, "Can any sum in excess of £1,

---

[2] (1887) 12 App.Cas. 409; 3 T.L.R. 745.

C. A.
1953

INLAND REVENUE COMMISSIONERS v. UNIVERSAL GRINDING WHEEL CO. LD.

"the full nominal value of the shares, be accurately described as "having been applied in reducing the capital?" In my judgment the answer is in the negative. The amount of the reduction of the capital is limited by the amount of the capital itself, and any sum in excess of £1 applied, is applied not in reduction of the capital, but as the price of redemption. This, in my judgment, is the plain meaning of the proviso as it stands, and this result is reached without the aid of any proviso to the proviso which it has been suggested must be implied in order to reach this end. I, for my part, therefore, would have allowed the appeal.

Appeal dismissed.
Leave to appeal to House of Lords.

Solicitors: *Solicitor of Inland Revenue; Linklaters & Paines.*

In re DELHI ELECTRIC SUPPLY AND TRACTION CO. LD.

[No. 00852 of 1951.]

C. A.
1953
Nov. 4, 5, 6, 9, 10.

Evershed M.R., Jenkins and Morris L.JJ.

Company—Winding up—English company trading in India—Whether Indian tax provable in liquidation of company—"Liabilities"—Unenforceable liability.

Conflict of Laws—Revenue laws—Whether enforceable in other State—Commonwealth countries—Administration of estates—Winding up of company—Rules applicable—Lex fori—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 302.

The Government of India sought to prove in the voluntary liquidation of a company trading in India but registered in the United Kingdom for a sum due in respect of income tax, including capital gains tax, which arose on the sale of the company's undertaking in India:—

Held, first, that the claim was unenforceable in England, for there was a well-recognized rule that claims by representatives of a foreign State to recover the revenues of that State would not be enforceable in English courts, and there was no valid distinction for this purpose between foreign States and States adhering to the British Commonwealth.

In re Visser [1928] Ch. 877; 44 T.L.R. 692 applied.

Dicta of Lord Mansfield in *Holman* v. *Johnson* (1775) 1 Cowp 341 explained.

Held, secondly, that the "liabilities" for which a liquidator was required to provide in the liquidation of a company by section 302 of the Companies Act, 1948, did not include claims which were unenforceable in the courts, and, therefore, this claim was not such a "liability."

Held, thirdly, that the meaning of "liabilities" in section 302 of the Act of 1948 must be determined by reference to English law, for the company was being wound up in the United Kingdom, and prima facie the rules governing the administration of an estate, whether of a company or a deceased person, were those of the lex fori.

In re Lorillard [1922] 2 Ch. 638; 38 T.L.R. 666 applied.

Per Jenkins L.J. The law of England does not accord extra-territorial validity to the revenue legislation of foreign States.

Decision of Vaisey J., *The Times,* July 31, 1953, affirmed.

Appeal from Vaisey J.

The Delhi Electric Supply and Traction Co. Ld., an English company incorporated in the United Kingdom in 1916, conducted an electricity undertaking in India, which in 1947 was acquired by the Government of India. The purchase was made in exercise of an option contained in the licence originally granted to the company to carry on their operations at Delhi. The greater part of the purchase money was paid in March, 1947, and was remitted to England a few days later. In April, 1947, an Act of the Indian legislature came into force which imposed a capital gains tax on profits such as that made by the company as a result of the sale over and above the book values of the capital. In September, 1948, the remainder of the purchase money was remitted to England, and on May 25, 1949, the company went into voluntary liquidation. On March 24, 1951, the liquidator published a notice in the Gazette of India calling on creditors to prove in the liquidation. The Government of India claimed in the liquidation in respect of assessments to income tax, including capital gains tax, the first assessment being dated August, 1949. The proofs of debt when made were rejected by the liquidator on the ground that they were for foreign tax. The Government of India then applied in accordance with the procedure contained in section 307 [1] of the Companies Act, 1948, and the rules made thereunder for a reversal of the liquidator's decision. The substance of the application was: "an application on behalf of the "Government of India, Ministry of Finance (Revenue Division) "of Aldwych, Strand, London, a creditor of the above-named "company for an order that the decision of Samuel Henry Taylor "the liquidator of the above-named company in the voluntary

---

[1] See note on p. 133.

"winding up thereof rejecting the claim of the Indian Government may be reversed and that the said claim may be allowed "in full."

The application came before Vaisey J., and on July 30, 1953, he made the following order: "The court doth not think fit to "make any order on the said application." The Government of India appealed.

N. E. Mustoe Q.C. and *Robert Phillips* for the Government of India. The rule that English courts will not enforce the claim of a foreign government to recover revenue in this country has never been applied in liquidation proceedings. The first question is whether the claim of the Government of India to be paid the sums owing by the company in respect of unpaid profits tax and income tax is a "liability" of the company within section 302 of the Companies Act, 1948.[1] The effect of sections 302 and 316 of that Act read together is that in a winding up all the debts of a company have to be satisfied, and it is not contended that there is any distinction in this matter between a solvent and an insolvent company. These taxes constitute a liability which must be discharged out of the company's assets: *In re General Rolling Stock Co.*[2]; *In re Smith, Knight & Co.*[3]; *In re Sablonière Hotel Co.*[4] It would be somewhat odd if a liquidator had not to provide for tax which was one of the liabilities of the company's business, and the wording of the Act should not be stretched to produce that result: *Gooch* v. *London Banking Association.*[5] The position with regard to statute-barred debts is different, for there one statute is opposed to another and a statute-barred debt may not be a liability: *Littlewood* v. *George Wimpey & Co. Ld. and British Overseas Airways Corporation.*[6] The ordinary meaning of "liable" is responsible. A debt may be unenforceable for the time being and still be a liability: *Arab Bank Ld.* v. *Barclays Bank (Dominion, Colonial and Overseas).*[7] There is no general rule as to what is meant by "liability" in section 302 of the Act of 1948. It is a question of fact in each case. It is common ground that these taxes were a liability in India for which the directors had to provide, and in the business sense they were a liability within section 302. There is a statutory duty to pay all creditors: *Pulsford* v. *Devenish.*[8] There is also a common law liability to do so: *In re Armstrong Whitworth Securities Co. Ld.*[9] [Reference was made to Buckley on the Companies Acts, 12th ed., p. 1055.] There is no jurisdiction to make an order directing payment; what the court is asked to do is to reverse the decision of the liquidator so that the proof stands and is automatically admitted. The court is not asked to enforce the claim in rem or in personam. Once a company goes into liquidation no proceedings to enforce a claim can be brought without the leave of the court.

---

[1] Companies Act, 1948, s. 302: "Subject to the provisions of this Act "as to preferential payments, the "property of a company shall, on its "winding up, be applied in satisfaction of its liabilities pari passu, and, "subject to such application, shall, "unless the articles otherwise provide, "be distributed among the members "according to their rights and interests in the company."

S. 307 (1): "The liquidator or any "contributory or creditor may apply "to the court to determine any question arising in the winding up of a "company, or to exercise, as respects "the enforcing of calls or any other "matter, all or any of the powers "which the court might exercise if "the company were being wound up "by the court."

S. 316: "In every winding up "(subject, in the case of insolvent "companies, to the application in "accordance with the provisions of "this Act of the law of bankruptcy) "all debts payable on a contingency, "and all claims against the company, "present or future, certain or contingent, ascertained or sounding only "in damages, shall be admissible to "proof against the company, a just "estimate being made, so far as possible, of the value of such debts or "claims as may be subject to any contingency or sound only in damages, "or for some other reason do not bear "a certain value."

[2] (1872) L.R. 7 Ch. 646.

[3] (1868) L.R. 5 Eq. 223.

[4] (1866) L.R. 3 Eq. 74.

[5] (1885–6) 32 Ch.D. 41.

Secondly, it is contended that there is no general rule that the courts of this country will never enforce the revenue laws of another country. All that was decided in *In re Visser* [10] was that an action could not be brought. It is submitted that that decision was wrong, for reliance was placed on a supposed common law rule, but if the authorities are considered which lead up to *In re Visser* [10] it appears that they lay down no consistent or general principle. The first and earliest group of cases are those concerned with smuggling. The decision of Lord Hardwicke C.J. in *Boucher* v. *Lawson* [11] had as its philosophical basis that there should be no restraint on trade and that our courts will not enforce the export restrictions of a foreign country. In *Holman* v. *Johnson* [12] and *Planche* v. *Fletcher* [13] Lord Mansfield stated: "No country "ever takes notice of the revenue laws of another." That statement, which is treated as the foundation of the rule applied in

---

[6] [1953] 3 W.L.R. 553; [1953] 2 All E.R. 915.

[7] [1953] 2 Q.B. 527; [1953] 2 All E.R. 263.

[8] [1903] 2 Ch. 625; 19 T.L.R. 688.

[9] [1947] Ch. 673; [1947] 2 All E.R. 479.

[10] [1928] Ch. 877.

[11] (1734) Cas.t.Hard. 85.

[12] (1775) 1 Cowp. 341.

[13] (1779) 1 Doug. 251.

In re Visser,[14] was made in connexion with smuggling operations, not in connexion with the revenue laws of a State as they exist today. *Holman* v. *Johnson* [15] has never been followed. It was distinguished by Lord Kenyon C.J. in *Clugas* v. *Penaluna*.[16] [Reference was also made to *Bernard* v. *Reed* [17] and *Waymell* v. *Reed*,[18] which established that the foreigner must obey the English revenue laws in any contract which he sought to enforce by the laws of this country.] Even if the plaintiff is abroad he can only enforce the contract here in a way which will not involve any breach of the English revenue laws. That is contrary to the proposition in *Holman* v. *Johnson* [19] that no country ever takes notice of the revenue laws of another country. If the foreigner must not do anything to infringe the English revenue laws, it follows that the Englishman has to take account of the foreign revenue laws.

The second group of cases was concerned with the effect of failure to stamp documents in accordance with the foreign law. In *Alves* v. *Hodgson* [20] Lord Kenyon C.J. rejected Lord Mansfield's dictum which held that a bill of exchange which was invalid because it was not duly stamped in Jamaica could not be sued on here. In *James* v. *Catherwood* [21] the basis of the proposition is stated to be convenience and reciprocity. In *Clegg* v. *Levy* [22] and *Bristow* v. *Sequeville* [23] the court considered the effect of the revenue laws of another country in connexion with the stamping of documents. Up to 1850 the position with regard to foreign law relating to stamps was that the courts of this country would not take notice of such laws so far as they related to the admissibility of a document in evidence, but they would take notice of such laws where they went to the validity of a contract.

There was also a third group of cases, of which the earliest was *Attorney-General of Canada* v. *William Schulze & Co.*,[24] which related to a penal suit. *Municipal Council of Sydney* v. *Bull* [25] related to a local impost similar to a rate. [Reference was also made to *State of Colorado* v. *Harbeck* [26]; Beale's Conflict of Laws, vol. 3, p. 1633; *Huntington* v. *Attrill* [27]; and to Dicey's Conflict of Laws, 6th ed., p. 152.]

---

[14] [1928] Ch. 877.
[15] 1 Cowp. 341.
[16] (1791) 4 Term Rep. 466.
[17] (1794) 1 Esp. 91.
[18] (1794) 5 Term Rep. 599.
[19] 1 Cowp. 341.
[20] (1797) 7 Term Rep. 241.
[21] (1823) 3 Dowl. & Ry. 190.
[22] (1812) 3 Camp. 166.
[23] (1850) 5 Exch. 275.
[24] (1901) 9 Sc.L.T. 4.
[25] [1909] 1 K.B. 7; 25 T.L.R. 6.
[26] (1921) 232 N.Y. 71; 133 N.E. 357.
[27] [1893] A.C. 150.

C. A.
1953

Delhi Electric Supply and Traction Co. Ld., *In re.*

It is submitted that those earlier authorities do not support the general proposition that our courts will never enforce the revenue laws of another country. Whatever may have been the principle underlying Lord Mansfield's dictum, until *In re Visser* [28] its application appears to have been limited to the enforcement of penal laws, and it should not now be extended to cover all matters arising out of the revenue laws of another country.

Unlike the present claim, the claim in *In re Visser* [28] was apparently for an unascertained sum, and the proceedings were directed to finding out how much was due. That case is distinguishable from the present. Further, it is doubtful, having regard to the comments of Scrutton L.J. in *Ralli Bros.* v. *Compania Naviera Sota y Aznar* [29] to the effect that the early authorities required reconsideration in the light of international comity as now understood, whether *In re Visser* [28] should now be regarded as correct. [Reference was made also to the comments of Sankey L.J. in *Foster* v. *Driscoll*,[30] which was decided about 12 months after *In re Visser*.[31]]

In *In re Visser* [31] Tomlin J. gave four reasons for the rule. He said first, that it encouraged freedom of trade; secondly, that it would be inconvenient for the courts of this country to have to consider and investigate foreign revenue laws; thirdly, that foreign countries would not reciprocate and enforce our revenue laws; and fourthly, that the enforcement of foreign revenue laws would be contrary to international comity, for it was possible that the foreign countries might impose taxes which English courts would regard as unconscionable. None of these reasons, it is submitted, applies to countries adhering to the British Commonwealth of Nations, where the financial laws are fundamentally uniform and not only are easily accessible in English courts but have to be considered by the English courts and applied for other purposes; for example, for the avoidance of double taxation: see *Inland Revenue Commissioners* v. *National Mortgage and Agency Co. of New Zealand*,[32] and, as regards India, *Assam Railways and Trading Co. Ld.* v. *Inland Revenue Commissioners*.[33] To apply the principle of *In re Visser* [34] to a country within the Commonwealth would be an unjustified extension. So far as Commonwealth countries are concerned, comity requires that a

---

[28] [1928] Ch. 877.

[29] [1920] 2 K.B. 287, 300; sub nom. *Sota & Aznar* v. *Ralli Bros.*, 36 T.L.R. 456.

[30] [1929] 1 K.B. 470, 518.

[31] [1928] Ch. 877.

[32] [1938] A.C. 524; 54 T.L.R. 586; [1938] 2 All E.R. 88; (1938) 22 T.C. 223.

[33] [1935] A.C. 445; 50 T.L.R. 540; (1934) 18 T.C. 509.

[34] [1928] Ch. 877.

C. A.
1953

DELHI ELECTRIC SUPPLY AND TRACTION CO. LD., *In re.*

tax which is enforceable in the Commonwealth country should be enforceable at any rate in the liquidation of a company in another country within the Commonwealth in which that company was incorporated. So far from the rule facilitating freedom of trade, if there is this bar as between Commonwealth countries, in respect of the payment of taxes, the country in which a company is trading would have to place an embargo on all business assets until taxes had been computed, assessed and paid. Clearly that would hamper and restrict the freedom of trade rather than promote it.

A rule which is founded on the principle of public policy is subject to review. [Reference was made to *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co. Ld.*[35]] Further, it is submitted that the statutory duty to pay all creditors overrides the alleged common law rule which is stated in *In re Visser* [36]; see *Canadian Pacific Railway Co.* v. *Roy.*[37] Dicey in his Conflict of Laws, 6th ed., p. 154, cites *The Eva* [38] in support of the proposition that foreign revenue laws, " whether embodied " in a judgment " or not, are not enforceable, but the case does not bear that out. The Foreign Judgments (Reciprocal Enforcement) Act, 1933, s. 1,[39] expressly excludes judgments for taxes, but that does not touch the present case.

Robert Phillips following. An equity arises on the construction of section 302 of the Companies Act, 1948. The claim of the Indian Government is a just claim which would be enforceable in India and, therefore, even if the common law rule as stated in *In re Visser* [40] by Tomlin J. must be accepted, it does not follow that this is not a " liability," for the equitable right of the creditor to be paid is implicit in the words used in section 302, since in a liquidation the assets of the company in the hands of the liquidator are fixed with a liability to pay all creditors: *Pulsford* v. *Devenish.*[41] The liquidator is a trustee for the creditors, and it would be unconscionable for him to refuse any just claim; in particular, he cannot, by placing reliance on the common law rule in *In re Visser,*[42] rightly reject a claim which would be

---

[35] [1894] A.C. 535; 10 T.L.R. 636.

[36] [1928] Ch. 877.

[37] [1902] A.C. 220; 18 T.L.R. 200.

[38] [1921] P. 454.

[39] Foreign Judgments (Reciprocal Enforcement) Act, 1933 (23 Geo. 5, c. 13), s. 1 (2): " Any judgment of a " superior court of a foreign country " . . . shall be a judgment to which " this Part of this Act applies, if— " . . . (*b*) there is payable thereunder " a sum of money, not being a sum " payable in respect of taxes or other " charges of a like nature or in respect " of a fine or other penalty. . . ."

[40] [1928] Ch. 877.

[41] [1903] 2 Ch. 625; 19 T.L.R. 688.

[42] [1928] Ch. 877.

C. A.
1953

Delhi Electric Supply and Traction Co. Ld., *In re.*

an enforceable liability of the company in a foreign country. [Reference was made to *Gooch* v. *London Banking Association*[43]; *In re Oriental Inland Steam Co.*[44]; *In re North Carolina Estate Co.*[45]; *In re Vocalion (Foreign) Ld.*[46]] Even if, contrary to the appellant's submission, a claim such as this is outside the scope of "liability" as used in section 302, there is still an overriding equity to pay all just claims in a winding up, and it is submitted that the extent to which assets should be applied is wider in a voluntary winding up than in a winding up by the court. [Reference was also made to *In re Art Reproduction Co.*[47]; *Knowles* v. *Scott*[48]; and *In re Dean, Cooper-Dean* v. *Stevens.*[49]]

Jennings Q.C. and *Oliver Smith* for the liquidator. A tax imposed by a foreign State is not enforceable by action in the United Kingdom. As Mr. Simon K.C. said in *Municipal Council of Sydney* v. *Bull*,[50] the courts of this country cannot be used as collectors of taxes for a foreign country, and that proposition underlies the decision of Tomlin J. in *In re Visser*,[51] which was not merely a decision on the form of action. The principle is as stated by Dicey, that the claim for a foreign tax cannot be enforced directly (as was attempted in *Municipal Council of Sydney* v. *Bull*[52]), or indirectly (as in *In re Visser*[53]). *In re Visser*[53] is not in conflict with *Ralli Bros.* v. *Compania Naviera Sota y Aznar*,[54] for Tomlin J. was confining himself to the enforcement of foreign laws; it is accepted that the courts are bound to recognize some of the consequences of these laws although they will not enforce them.

The authorities before *Municipal Council of Sydney* v. *Bull*[55] are directed to a consideration of whether the dicta of Lord Mansfield that "no country has regard to the revenue laws of "another country" ought to bear a wide meaning, so as to give force to a contract even if it involves a breach of foreign law. In *Attorney-General* v. *Lutwydge*[56] Lord Pengelly held that before the Act of Union with Scotland the revenue laws of Scotland were unenforceable here; that case has also some relevance to the submission of the appellants that a distinction should be made in favour of Commonwealth countries. Recently, in *Kahler* v.

---

[43] 32 Ch.D. 41.
[44] (1874) L.R. 9 Ch. 557.
[45] (1889) 5 T.L.R. 328.
[46] [1932] 2 Ch. 196; 48 T.L.R. 525.
[47] [1952] Ch. 89; [1951] 2 T.L.R. 979; [1951] 2 All E.R. 984.
[48] [1891] 1 Ch. 717; 7 T.L.R. 306.
[49] (1889) 41 Ch.D. 552; 5 T.L.R. 404.
[50] [1909] 1 K.B. 7.
[51] [1928] Ch. 877.
[52] [1909] 1 K.B. 7.
[53] [1928] Ch. 877.
[54] [1920] 2 K.B. 287.
[55] [1909] 1 K.B. 7.
[56] (1729) Bunb. 280.

Midland Bank Ld.,[57] the House of Lords treated it as axiomatic that the courts of this country would not enforce foreign currency laws, but the House of Lords said that giving cognizance to the law relating to the foreign currency restrictions was not enforcing the revenue laws: see the speeches of Lord Normand,[58] where he refers to *Ralli Bros.* v. *Compania Naviera Sota y Aznar*[59]; Lord Reid[60]; and Lord Radcliffe.[61] [Reference was also made to *Cotton* v. *The King*.[62]]

Beale's Conflict of Laws, an American textbook, refers to the American cases of *Henry* v. *Sargent*[63] and *Maryland* v. *Turner*.[64] In *Colorado* v. *Harbeck*[65] Pound J. said that the rule was universally recognized that the revenue laws of one country had no extraterritorial validity. In *Milwaukee County* v. *M. E. White Co.*[66] the court was concerned with the question of whether one State would enforce a judgment of another State relating to the revenue laws, but the question which is at issue here, that is, whether the revenue laws themselves were enforceable in another State, was left open.

In *Municipal Council of Sydney* v. *Bull*[67] Mr. Simon K.C. justified the rule on the ground of domestic management and regulation. The express exclusion of foreign taxes by section 1 (2) from the Foreign Judgments (Reciprocal Enforcement) Act, 1933, which by Order in Council has been applied to India, strongly reinforces the rule. A similar exclusion is made in the corresponding Indian legislation.

If a claim for a foreign tax is unenforceable by action brought in this country, it is not a "liability" of the company existing at the date of the winding up within section 302 of the Companies Act, 1948. No claim can be regarded as being a "liability" within that section unless the claimant is entitled to come to the courts of this country and enforce his claim either immediately or at some future time. Here, there is admittedly a debt which would have been due in India, but the liquidator has to decide which claims are "liabilities" according to the laws of this country. The administration both of the estate of a deceased person and a moribund company is determined by the lex fori, not the lex loci contractu; see also Dicey, Conflict of Laws, 6th ed., rule 176, p. 811, rule 175, p. 808. Similarly, in a bankruptcy the trustee can only have regard to claims which are enforceable by legal action. Consequently, if the principle of *In re Visser* [68] is correct, there is no debt or liability which can be proved for either under sections 302 or 316 of the Companies Act, 1948.

---

[57] [1950] A.C. 24; 65 T.L.R. 663; [1949] 2 All E.R. 621; ([1948] 1 All E.R. 811, C.A.).

[58] [1950] A.C. 24, 36.

[59] [1920] 2 K.B. 287.

[60] [1950] A.C. 24, 46.

[61] Ibid. 57.

[62] [1914] A.C. 176.

[63] (1843) 13 New Hamp. 321.

[64] (1911) 132 N.Y. 173.

[65] 232 N.Y. 71; 133 N.E. 357.

[66] (1935) 296 U.S. 268.

[67] [1909] 1 K.B. 7.

Wynn-Parry J. decided in *In re Art Reproduction Co. Ld.*[69] that a statute-barred debt could not be proved for in the liquidation of a solvent company on the ground that " liability " cannot include an unenforceable debt. A statute-barred debt may have been a liability in the ordinary sense of that term, but it could not be sued for and, therefore, was not a liability in the statutory sense. Wynn-Parry J. said that he could see nothing but confusion resulting if a distinction was made between a voluntary and an involuntary liquidation in this respect. [Reference was also made to *In re Lorillard.*[70]]

The history of section 307 supports the liquidator's view. Section 307 originated in section 138 of the Companies Act, 1862.[71] Section 307 enables a contributory to apply to the court for the determination of any question, but section 138 of the Act of 1862 only enabled the liquidator or a contributory to apply in a voluntary liquidation. Consequently, if the liquidator refused to admit a proof, the only remedy of the dissatisfied creditor was to bring an action against the company to establish his debt: *In re Poole Firebrick and Blue Clay Co.*[72] By the Companies Act, 1900, s. 25, an amendment was made so as to enable a creditor to apply to the court in a voluntary winding up. If this case had been brought before that amendment was made, the Indian Government could only have brought an action, and, if the appellant's general submission is right, that action must have failed, because of the rule in *In re Visser.*[73] The amendment of 1900 was, however, purely procedural and was not intended to have the effect of extending the rights of creditors.

Mustoe Q.C. in reply. This is not an action, as was that in *In re Poole Firebrick and Blue Clay Co.*,[74] for enforcement of the

---

[68] [1928] Ch. 877.

[69] [1952] Ch. 89.

[70] [1922] 2 Ch. 638; 38 T.L.R. 666.

[71] Companies Act, 1862 (25 & 26 Vict. c. 89), s. 138: " Where a com-" pany is being wound up voluntarily " the liquidators or any contributory of " the company may apply to the court " . . . to determine any question " arising in . . . such winding up, or " to exercise . . . all or any of the " powers which the court might exer-" cise . . . if the company were being " wound up by the court."

[72] (1873) L.R. 17 Eq. 268.

[73] [1928] Ch. 877.

[74] L.R. 17 Eq. 268.

C. A.

1953

DELHI ELECTRIC SUPPLY AND TRACTION CO. LD., *In re.*

foreign revenue law, but is an application to the court to reverse the decision of the liquidator.

There is no express decision that a statute-barred debt cannot be proved in a liquidation. The line of authorities begins with *In re River Steamer Co., Mitchell's Claim*,[75] where it was assumed that a statute-barred debt could not be proved, and the other cases followed on that. In *In re Art Reproduction Co. Ld.*[76] the position was said to be the same in a liquidation as it would be in connexion with the administration of a deceased person's estate, that is, that the liquidator would be unable to admit the claim if the shareholders objected. In *In re Lorillard* [77] the debts had been statute-barred for 20 years, and in those circumstances it is difficult to see how the debts could be regarded as a liability. Secondly, the Court of Appeal regarded the decision as being a matter for the exercise of judicial discretion, and they found no ground for interfering with the exercise of his judicial discretion by Eve J. *In re Lorillard* [77] was a very special case and it has not been followed.

If the issue here had been as to the enforceability of a statute-barred debt in a liquidation, it would be necessary to see whether at the relevant date the debt had been accepted and regarded as a "liability." Even if a statute-barred debt cannot be sued for, it can sometimes be discharged in some other way, as, for example, by a set-off; whereas if the present claim is rejected it cannot be recovered at all, although the liquidator concedes that it is an obligation and would have been a debt in India.

The rule in *In re Visser* [78] is that a claim for foreign tax is unenforceable by action at law; that affects only claims to recover by some legal process and does not touch the present claim in the voluntary liquidation. *Kahler* v. *Midland Bank Ld.*[79] turned on quite a different point and is not authoritative on the issue in this case. Beale's Conflict of Laws, although it was published in 1935, does not refer to *Milwaukee County* v. *M. E. White Co.*,[80] which, it is submitted, shows that in the United States of America the question both as between States in the Union and internationally is left open. It is said that the exclusion of tax claims from Part I of the Foreign Judgments (Reciprocal Enforcement) Act, 1933, supports the respondent's contention. It is, however, significant that Part I deals only with registration of claims; the Act is not intended to be an expression of opinion by the legislature whether tax claims can, or cannot, be enforced here. The Act was intended to apply to claims between private individuals, and it is inevitable that tax claims should be excluded from it.

---

[75] (1871) L.R. 6 Ch. 822.

[76] [1952] Ch. 89.

[77] [1922] 2 Ch. 638.

[78] [1928] Ch. 877.

[79] [1950] A.C. 24.

[80] 296 U.S. 268.

The reliance on international comity as a ground of support for the rule in *In re Visser* [81] is ill-founded, for Dominion and many foreign countries can impose extraterritorial taxes in certain circumstances, and it is incorrect to say that it is against international comity to recognize them. For example, in South Africa there is a "non-resident's tax." If the foreign country can effectively collect the tax, or in confiscation cases can effectively change the title, the English courts will give effect to the legislation.

"Liability" in section 302 of the Companies Act, 1948, is used in its widest sense, and is not limited to claims which can be enforced by action now or in the future in the English courts. That wide sense was deliberately used because a liquidation leads inevitably to the dissolution of the company and, therefore, unless a creditor can prove in the liquidation, his rights must disappear. In that setting a common law rule, which has never previously been applied where a foreign government is the plaintiff claiming taxes, ought not now to be allowed to take an admitted liability out of section 302.

The English courts will take notice of the foreign law in the administration of the estate of a deceased person, or an estate in bankruptcy, and it is submitted that in a liquidation of a company registered in England the courts will take notice of liabilities of the company according to the law of the country in which the company is or was carrying on its business.

EVERSHED M.R. The question is whether the applicant, the Government of India, Ministry of Finance (Revenue Division), ought to be admitted to proof in the liquidation of the Delhi Electric Supply & Traction Co. Ld. for a sum of income tax substantially, though not wholly, consisting of capital profits tax, which is, in India, a form of income tax. The sum involved is large and, as regards the capital profits tax, arose on the sale of the whole undertaking of the company in India pursuant to an option which was contained in the original licence granted to the company to carry on their electrical operations in or near the city of Delhi for a period of 42 years. The sale necessarily put an end to the business activities of the company, and the company, which is an English company incorporated in this country in 1916, is now being wound up in England, the necessary resolutions having been passed for a voluntary liquidation of the company on the footing that it was solvent.

---

[81] [1928] Ch. 877.

The sale to which I have alluded took place early in 1947, and the greater part of the purchase-money was paid on March 1, 1947, in India, but was remitted from India to England a few days later. In April, 1947, an Act of the Indian legislature came into force which introduced the capital profits tax, and, as has been said on behalf of the Indian revenue authorities, the tax was applicable to the profit made over or in excess of the book values as the result of the sale. In September, 1948, the balance of the purchase price was remitted to this country, and in May, 1949, the company went into liquidation in the manner I have mentioned.

The subject-matter of the claim consists of more than one assessment, the claim in respect of the first assessment being dated August, 1949. No charge or suggestion has been made by the applicant that the liquidator in any way surreptitiously removed the assets of the company from India to evade the payment of the capital profits tax.

The liquidator, however, rejected the claim of the Government of India to prove, and in accordance with the procedure applicable under section 307 of the Companies Act, 1948, and the rules made under that Act, the Government of India applied to the judge having cognizance of these matters for a reversal of the liquidator's decision. [His Lordship referred to the application and the order of Vaisey J., and continued:]

The arguments before us have ranged over a wide area, and a large number of authorities has been cited. I think, however, that the point is a short one. The question is whether the liability, which is one that the company would have been bound to discharge in India (that is, so long as the company operated in India, or remained subject to the effective jurisdiction of the Indian courts) is a liability for which the liquidator must make provision under the terms of the Companies Act, 1948, in particular, section 302 of that Act. [His Lordship read section 302 and continued:] Section 316, which is the first of a number of "provisions applicable to every mode of winding up," provides: [His Lordship read the section.] Section 307 gives power to a creditor or an alleged creditor to make application in the manner in which it is made in this case. [His Lordship read section 307 and continued:] There can be no doubt that, for example, a trading obligation incurred in the ordinary way by this company in India would be a liability within the language of the provisions of the Act which I have read. Prima facie at any rate, an Indian creditor, claiming by virtue of some trading contract entered into in India, would be entitled to come to the courts of this country and to establish and enforce his claim here. But it is said that there is an old-established principle of English law that the courts of this country cannot be used as a means of collecting taxes imposed by another State, and it is further said that the liabilities mentioned in section 302 of the Companies Act, 1948, do not, and cannot, include liabilities of a kind which cannot be enforced here, in particular liabilities in respect of taxes imposed by a foreign State.

The existence of the so-called rule in regard to collecting taxes claimed by foreign countries has undoubtedly been assumed for very many years. According to Lord Tenterden, it is attributable in origin to Lord Hardwicke, as will later appear. What is perhaps remarkable, however, is the fact that though the rule has been referred to from time to time as being well established, it is only rarely and recently that its validity has been directly tested in cases which are at all comparable to the present, and it has never been directly tested in this court in such a case.

The most recent case, in which the matter was directly in issue, was *In re Visser*,[1] before Tomlin J. The plaintiff in that action was the Queen of Holland and the defendants were executors of the deceased Visser. The action was, in form, an administration action as commonly experienced in the Chancery Division of the High Court. By the claim, the plaintiff asked for a declaration that she was a creditor of Visser's estate and for an account, and, if necessary, an order for the administration of the estate of the deceased person. An application was then made by the defendants to strike out the plaintiff's claim on the ground that it disclosed no reasonable cause of action by reason of the fact, as was alleged, that in the claim the plaintiff was seeking to enforce, whether directly or indirectly, a foreign revenue claim, the plaintiff being a foreign sovereign.

The numerous cases to which we have been referred were referred to in the course of the argument in *In re Visser*,[1] and Tomlin J. stated his conclusions in the following terms [2]: "My "own opinion is that there is a well-recognized rule, which has

---

[1] [1928] Ch. 877; 44 T.L.R. 692.

[2] [1928] Ch. 884.

"been enforced for at least 200 years or thereabouts, under which "these courts will not collect the taxes of foreign States for the "benefit of the sovereigns of those foreign States; and this is "one of those actions which these courts will not entertain." Having examined all the cases and such passages in the textbooks as have been referred to before us, I am of the same opinion as was Tomlin J. I think that the alleged principle is properly formulated in the way in which I have already stated it, namely, that the courts of this country will not, and cannot, be used as a means of collecting taxes imposed by another State. That convenient and, as I think, correct statement is derived from the reported argument of Mr. Simon K.C. in one of the two earlier cases in which the matter was directly in issue, namely, *Sydney Municipal Council* v. *Bull*,[3] before Grantham J. That was an action brought by the council directly against the defendant Bull, claiming local rates or local revenue. Mr. Simon is reported as having said: "International comity does not extend to the "recognition of liabilities imposed by a State on its subjects for "its own domestic management and regulation." The word "subjects" must, I think, mean "persons subject to its juris-"diction." The argument goes on: "For that reason the penal "laws of a foreign country are not subject-matter of an action "in this country." Then he made a reference to Dicey on Conflict of Laws, 2nd ed., p. 220, r. 40, and continued: "nor are "suits for the recovery of penalties, pecuniary or otherwise, for "any violation of statutes enacted by a foreign State for the pro-"tection of its revenue or other municipal laws." Then comes the most significant sentence for present purposes: "For the "same reason the courts of one State cannot be used as a means "of collecting the taxes imposed by another," and Mr. Simon cited as authority in support of that proposition an American case, *Henry* v. *Sargent*,[4] to which I shall have occasion to make some reference hereafter.

On general principles both of justice and convenience there is, to say the least, much to commend the rule as I have stated it, though, undoubtedly, there may be hard cases, of which the present case may well be one. If there were no such rule the result, as it seems to me, would be that all revenue claims from other countries would become liable to be enforced here. That, however, is beside the present point. The question is, and this court is for the first time asked to re-examine the matter, what is the authority for the existence of this rule as I have attempted to formulate it? Of the two earliest cases to which we were referred, the first was *Attorney-General* v. *Lutwydge* [5] (referred to by Mr. Jennings). In that case the plaintiff was the English Attorney-General, and he sought to recover a sum alleged to be due upon a bond which was executed at Dumfries in Scotland. Lord Chief Baron Pengelly said: "Before the union [of England "and Scotland] this court had no jurisdiction of the revenues in "Scotland." I think that only means in its context that the court in England had no jurisdiction to collect revenues in Scotland for English purposes and I doubt whether it has any bearing on the rule which we are now considering.

---

[3] [1909] 1 K.B. 7, 9.

[4] (1843) 13 New Hamp. 321.

Mr. Mustoe referred to *Boucher* v. *Lawson.*[6] That was a case concerning the freight of certain goods, and the point which emerged was that the voyage had involved exporting gold from Portugal which, according to Portuguese law, was an illegal traffic. In the course of his judgment, Lord Hardwicke C.J. said [7]: "But if it should be laid down, that because goods are "prohibited to be exported by the laws of any foreign country "from whence they are brought, therefore the parties should "have no remedy or action here, it would cut off all benefit of "such trade from this kingdom, which would be of very bad "consequence to the principal and most beneficial branches of "our trade." When the matter was later before the court, Lord Hardwicke observed [8]: "I think the unlawfulness of the trade "makes no difference, for it is not material to us what the law "of Portugal is, but what the law of England is, and here in "England it is not only a lawful trade, but very much "encouraged." Whether that case was cited because it was before Lord Hardwicke and was possibly the origin of Lord Tenterden's attribution of the relevant statement to Lord Hardwicke, I do not know; but I think that it has a remote bearing upon the present problem. Its consequence may be, as Mr. Mustoe naturally and properly stated, that the rule was derived from a desire not to hinder but rather to promote all forms of trading. In those days the revenue laws likely to be involved, if the rule existed, would not be those relating to what we now know as income tax (which had not then emerged upon the experience of mankind), but rather those relating to customs duties, which tended, no doubt, to interfere with trade.

---

[5] (1729) Bunb. 280, 281.

[6] (1734) Cas.t.Hard. 85.

[7] Ibid. 89.

[8] Ibid. 198.

The first real statement of the rule is to be found in two cases before Lord Mansfield, *Holman* v. *Johnson*[9] and *Planche* v. *Fletcher*.[10] In *Holman* v. *Johnson*[11] the seller of tea, under a contract made with the buyer in Dunkirk, sued for the price. The buyer had, in fact, smuggled the tea into England, and it was proved that the seller knew when he made his contract that such was the intention of the buyer; but the seller was, himself, in no way implicated in, nor was he concerned with, the smuggling operations. The contract of sale made between him and the buyer in Dunkirk was such a contract as he might have made with any other buyer, whatever had been the later intention or activity of the buyer. For that reason it was held that the plaintiff was entitled to recover. But in the course of the judgment appears the classic statement of Lord Mansfield from which, according to the books as they are now available to us, everything else has flowed. The statement is[12]: " For no " country ever takes notice of the revenue laws of another."

That statement was repeated almost in the same terms in the later case, *Planche* v. *Fletcher*.[13] The facts of that case also were far removed from those of the present. It concerned the insurance of a ship which was intended to go, and did go, direct to Nantes, though it had been cleared to Ostend, it being the apparent but not the actual intention that the vessel should call at Ostend and not go direct to Nantes. That circumstance affected the customs duties which might be exacted. It was suggested that the sailing direct to Nantes was a fraud on the underwriters, but that suggestion was clearly rejected by Lord Mansfield, and in the course of his judgment he made use again of the formula[14]: " One nation does not take notice of the " revenue laws of another."

Mr. Mustoe then referred to three cases which came before Lord Kenyon C.J., and it was part of his submission that Lord Kenyon did not accept Lord Mansfield's dictum, but proceeded upon some different principle. If that were so, it would no doubt weaken the authority of the original formula of Lord Mansfield. I am, however, of the opinion that there is no dissent between Lord Mansfield and Lord Kenyon. Indeed, as will appear in a moment, I think it is clear that Lord Kenyon accepted as established the rule which Lord Mansfield had formulated. The

---

[9] (1775) 1 Cowp. 341.

[10] (1779) 1 Doug. 251.

[11] 1 Cowp. 341.

[12] Ibid. 343.

[13] 1 Doug. 251.

[14] Ibid. 253.

C. A.
1953

Delhi Electric Supply and Traction Co. Ld., *In re.*

Evershed M.R.

three cases are *Clugas* v. *Penaluna*,[15] *Bernard* v. *Reed*,[16] and *Waymell* v. *Reed*.[17] In *Clugas* v. *Penaluna*[18] a contract had been made in Guernsey for the sale of brandy and gin to a buyer, but, unlike *Holman* v. *Johnson*,[19] it was part of the bargain not only that the buyer should buy in Guernsey the brandy and the gin, but that the seller should participate in the operation of smuggling the brandy and gin into England; for it was part of the arrangement that the seller should pack the brandy and gin in a particular manner which was appropriate to the smuggling operation which was to follow. It was held, therefore, that the seller, being particeps criminis with the buyer, could not recover in this country; in other words, he could not set up the contract which disclosed his own wrong in being a party to the smuggling operation. Buller J. said[20]: "If goods be bona fide sold in "Guernsey, and delivered there in the fair course of trade, the "seller may recover the price of them here, though they be "afterwards smuggled into this country. But here the plaintiff "himself was assisting in the act of smuggling, by the means "of packing the goods; for the spirits were delivered in ankers, "which are used for the purpose of smuggling; and if he take "part in the transaction, it taints the whole of it. And this "distinguishes the case of *Holman* v. *Johnson*[21] from the "present." The leading judgment of Lord Kenyon C.J. had been to the same effect. I should add that at the end of the report[22] there is the observation by Lord Kenyon that this case was in other respects distinguishable from *Holman* v. *Johnson*.[23]

It seems to me that there is no question in *Clugas* v. *Penaluna*[24] of any reluctance or refusal on Lord Kenyon's part to adopt as a valid principle of law what Lord Mansfield had stated in the earlier cases.

Bernard v. *Reed*[25] is really to the same effect as *Clugas* v. *Penaluna*.[26] In *Waymell* v. *Reed*[27] Lord Kenyon in terms accepted and treated as good law the proposition which Lord Mansfield had earlier stated. He said[28]: "It is sufficient, in "order to dispose of this case, to advert to the distinction laid "down by Lord Mansfield in *Holman* v. *Johnson*,[29] to which I

---

[15] (1791) 4 Term Rep. 466.
[16] (1794) 1 Esp. 91.
[17] (1794) 5 Term Rep. 599.
[18] 4 Term Rep. 466.
[19] 1 Cowp. 341.
[20] 4 Term Rep. 466, 467.
[21] 1 Cowp. 341.
[22] 4 Term Rep. 466, 468.
[23] 1 Cowp. 341.
[24] 4 Term Rep. 466.
[25] 1 Esp. 91.
[26] 4 Term Rep. 466.
[27] 5 Term Rep. 599.
[28] Ibid. 600.
[29] 1 Cowp. 341, 343.

"entirely subscribe, that where the contract and delivery of "goods are complete abroad, and the seller does no act to assist "the smuggling them into this country, such a contract is valid, "and may be recovered upon here. But here the plaintiff was "concerned in giving assistance to the defendants to smuggle "the goods, by packing them in the manner most suitable for, "and with intent to aid, that purpose. He cannot, therefore, "resort to the laws of this country to assist him in carrying his "contract into execution. What was said by Lord Mansfield, "at the end of *Holman* v. *Johnson* [29] comes up to the present "case." Those three cases, therefore, cannot in my judgment be used to support the suggestion that there was any conflict between Lord Mansfield and Lord Kenyon, or that Lord Kenyon doubted the validity of the proposition which Lord Mansfield had enunciated.

The next cases in the series are those relating to a specific matter of stamp duty, and they differ from the present in this respect. In the first, *Alves* v. *Hodgson*,[30] it appears that the absence of a stamp on a contract made in a foreign country altogether invalidated the contract in that country, so that it could not be proceeded upon there or anywhere else. In two other cases, *James* v. *Catherwood* [31] and *Bristow* v. *Sequeville*,[32] the evidence was that in the foreign country the absence of a stamp only affected the admissibility of the contract in evidence, as distinct from its validity; and it was, therefore, held that in this country, since the rules of evidence went according to the lex fori, there was nothing to prevent the admissibility of the contracts in evidence, notwithstanding the absence of stamps which would have made them inadmissible in the courts of the country of their origin.

I shall not refer to *Alves* v. *Hodgson* [33] except to read what Baron Rolfe said about it when I come to the third of the cases, *Bristow* v. *Sequeville*.[34] I have mentioned *James* v. *Catherwood* [35] specifically because that was the case in which Lord Tenterden (then Abbott C.J.) attributed the origin of the rule, as I have earlier stated, to Lord Hardwicke. Abbott C.J. in his judgment said [36]: "This point is too plain for argument. It has "been settled, or at least considered as settled, ever since the "time of Lord Hardwicke, that in a British court we cannot

---

[29] 1 Cowp. 341.
[30] (1797) 7 Term Rep. 241.
[31] (1823) 3 Dowl. & Ry. 190.
[32] (1850) 5 Exch. 275.
[33] 7 Term Rep. 241.
[34] 5 Exch. 275.
[35] 3 Dowl. & Ry. 190.
[36] Ibid. 191.

"take notice of the revenue laws of a foreign State. It would "be productive of prodigious inconvenience, if in every case in "which an instrument was executed in a foreign country, we "were to receive in evidence, what the law of that country "was, in order to ascertain whether the instrument was or was "not valid. Nothing must be taken by the motion." The note of the reporter at the foot is: "Vide *Holman* v. *Johnson*, where "Lord Mansfield says [37]: 'no country takes notice of the revenue "'laws of another.'" That statement of Abbott C.J. may, I think, be in some respects rather wide, but it does not matter for present purposes whether it is entirely correct or not.

In the third case mentioned, *Bristow* v. *Sequeville* [38] (which was, like the second, a case where the document, by reason of the absence of the stamp, was inadmissible according to the laws of the foreign country being the country of its origin) Baron Rolfe said about *Alves* v. *Hodgson*,[39] the first case in this series of three [40]: "The marginal note of *Alves* v. *Hodgson* [41] is perfectly correct, although I cannot help thinking "that there must be some mistake in the report of the case. "The marginal note is in these terms: 'The plaintiff cannot "'recover upon a written contract made in Jamaica, which, by "'the laws of that island, was void for want of a stamp.' I agree "that if for want of a stamp a contract made in a foreign country "is void, it cannot be enforced here. But if that case meant "to decide, that where a stamp is required by the revenue laws "of a foreign State before a document can be received in evidence "there, it is inadmissible in this country, I entirely disagree."

I have referred to those last three cases because it seems to me that, when examined, the only bearing which they have on the matter in hand is that they show that in certain circumstances the courts will "take notice" of the revenue laws of a foreign country, in the sense that if the stamp laws of a foreign country affect the validity of the contract in the country of origin, then these courts may hold, as in *Alves* v. *Hodgson*,[41] that no contract has been made which could be sued upon either in the foreign country or anywhere else. But those cases do not touch the question with which we are directly concerned, namely, whether the courts of this country can be used to collect revenue of another country, whether the revenue is imposed as stamp duty, income tax, customs duty, or in any other way.

---

[37] 1 Cowp. 341, 343.

[38] 5 Exch. 275.

[39] 7 Term Rep. 241.

[40] 5 Exch. 275, 279.

[41] 7 Term Rep. 241.

But I think that the matter goes further. Having looked at these cases, I think they show that a general rule in the form stated by Lord Mansfield (whatever may be its exact scope) was treated by lawyers in this country in the eighteenth century as well established. I think that it is equally clear that the rule has continued thenceforward to be accepted. As I have already said, its origin may well have had to do with questions of freedom of trade and the direct application to that problem of customs duties imposed by foreign countries. But that is no more than the accident of its birth, and does not affect the existence of the principle and its applicability to other forms of revenue which may from time to time emerge. I think, then, that these cases show that, though the full import of the words "no country ever takes notice of the revenue laws of another,"[42] may require explanation or even qualification, the true rule, which was then regarded and should be now regarded as well established, is that claims by representatives of a sovereign foreign State to recover penalties or the revenues of that State will not be enforceable in these courts.

I have used the two words "penalties" and "revenues." We have not in this case been concerned with penalties, but I observe that there is a certain affinity between the two. The distinction between that which is a penalty and that which is mere revenue may in some circumstances obviously be somewhat fine.

The three instances when direct application of the rule came before the courts are much later in date. The first was a Scottish case, and though of course the law of Scotland is not the law of England, this rule, as will later appear, was always treated, and was stated by Lord Mansfield, as a rule of private international law. In any event, the courts of this country will always pay regard to the decisions of the Scottish courts. The case was *Attorney-General for Canada* v. *William Schulze & Co.*[43] In that case certain goods of the defendant had been seized in Canada, and the Canadian courts had affirmed the validity of the seizure and ordered the defendant to pay costs incurred in the Canadian courts when that matter was there decided. The Attorney-General for Canada then sued the defendant in Scotland to recover the costs. It was contended by the defendant that the costs were vitally concerned with, and inseparable from, the penalty of the seizure and that, therefore, the suit would not be entertained by the Scottish courts. The Scottish courts held in favour of that contention.

---

[42] 1 Cowp. 341.

[43] (1901) 9 Sc.L.T. 4.

In *Municipal Council of Sydney* v. *Bull* [44] there was a claim made against Bull directly to recover local revenue charged by the Municipality of Sydney. The argument of Mr. Simon K.C., which I have already read, was accepted by Grantham J., and the suit was dismissed.

In the third case, *In re Visser*,[45] to which I have already made reference, Tomlin J., at the beginning of his judgment said [46]: "The short ground for the application [to "strike out the statement of claim] is that these courts do not "take notice of the revenue laws of a foreign State,"—and there Tomlin J. is quoting Lord Mansfield, "and that the foreign "State cannot sue in this country for the recovery of taxes "falling to be paid under the foreign law"—the second part of the statement being the particular application of the general rule earlier stated. Tomlin J. observed [47] that in Dicey's Conflict of Laws there appeared, for the first time in the 3rd edition, published in 1922, the word "revenue" in addition to the word "penalty." It is significant that there was no new edition of Dicey before 1922 after the decision of Grantham J. in 1909 in *Municipal Council of Sydney* v. *Bull*.[48] I shall refer to Dicey presently, but Tomlin J. in that part of his judgment accepted the revised statement of Dicey appearing in the third edition, as it has since appeared in later editions.

Tomlin J. considered particularly the stamp duty cases, *Alves* v. *Hodgson*,[49] *Clegg* v. *Levy* [50] and *Bristow* v. *Sequeville*,[51] two of which I have already mentioned, and said [52]: "They really turn upon this, that where you "are suing on an instrument or contract—a foreign instru"ment or contract—you have to establish its validity according "to foreign law, but if it is valid according to foreign law, it is "none the less valid because of a provision of revenue law. If, "on the other hand, the revenue law does not operate to "invalidate the instrument, but only affects its admissibility in "evidence, then it is plain, on *Bristow* v. *Sequeville*,[53] that the "instrument would be admissible in evidence in our law. Now "that seems to me to be the explanation of those cases, and all

[44] [1909] 1 K.B. 7.
[45] [1928] Ch. 877.
[46] Ibid. 881.
[47] Ibid.
[48] [1909] 1 K.B. 7
[49] 7 Term Rep. 241.
[50] (1812) 3 Camp. 166.
[51] 5 Exch. 275.
[52] [1928] Ch. 877, 883.
[53] 5 Exch. 275.

"that those cases do is to indicate that however unwilling the "courts may be to recognize foreign law, there are certain cases "in which, although they do not enforce the foreign revenue "law, they are bound to recognize some of the consequences of "that law—namely, those cases where, as one of the terms of "the law, contracts are rendered invalid by the foreign law." Again I respectfully agree and adopt that conclusion of Tomlin J. upon those stamp cases.

The existence of this rule and its particular application to the recovery of revenue has since, as I think, been further recognized, not only in the courts, but also by Parliament in this country. In *Kahler* v. *Midland Bank Ld.*,[54] reference to the existence of the rule is to be found both in the judgments in this court and in the speeches in the House of Lords.[55] The matter was not directly at issue and I do not, therefore, suggest that the references which I am about to make amount to more than dicta, but they are dicta of authority in these courts, and they recognize, as I have said, the existence of this rule and treat it as well-established. The plaintiff Kahler claimed to be entitled, as against the Midland Bank Ld., to certain securities. The Midland Bank Ld. was the bailee of those securities for a Czech bank, and the question was whether the Midland Bank Ld. could properly hand over the securities to the plaintiff. The answer to his claim was that they held them to the order of the Czech bank, and that any transfer out of the name of the Czech bank would involve an infringement of Czechoslovak currency laws, the contract relevant for consideration being held to be governed by Czech law; with the result, as this court and the House of Lords held, that the Midland Bank Ld. could not be required to do something which would involve an infringement of the law applicable to the contract on the part of the Czech bank. In the leading judgment in the Court of Appeal I said [56]: "It is, indeed, "conceded that, save with the necessary permission, the "Bohemian bank could not consent to the transfer of the "securities in the defendants' books from its own name to that "of the plaintiff without a contravention on its part of the "regulation to which the bank is subject, and, in my judgment, "recognition of this fact does not amount to an enforcement of "the 'revenue laws' of another country. Assuming in the "plaintiff's favour that the currency regulations in question can

---

[54] [1948] 1 All E.R. 811.

[55] [1950] A.C. 24; 15 T.L.R. 663; [1949] 2 All E.R. 621.

[56] [1948] 1 All E.R. 811, 819.

"properly be described as 'revenue laws,' it is, it seems to me, "necessary for the plaintiff to show that the English courts will "not in any circumstances 'have regard to' such laws, even "though it is not in any proper sense of the term 'enforcing' "them."

In the House of Lords, Lord Normand said,[57] after referring to *Ralli Bros.* v. *Compania Naviera Sota y Aznar*[58]: "The "principle on which they were decided is that the courts of this "country will not compel the fulfilment of an obligation when "performance includes the doing in a foreign country of something which the laws of that country make it illegal to do. "But a judgment in rem compelling the delivery of securities "held in London would not involve the doing of anything in a "foreign country. I think that the dismissal of the appeal "does not involve the enforcement of Czechoslovakia revenue "laws or penal laws." Lord Reid said[59] (and it is not relevant for this purpose that Lord Reid's opinion was a minority opinion): "In my judgment those regulations do not come within the "category of confiscatory or fiscal legislation of a foreign country "which English courts cannot recognize." Finally, Lord Radcliffe said[60]: "I should not have been prepared to treat "such currency regulations as we are concerned with here as if "they were no more than the 'penal or revenue laws' of another "State the existence of which our courts are traditionally "disposed to ignore."

In each of those citations it is, I think, plain that those from whose observations I have quoted are treating as a well-established axiom or principle of the law the principle formulated long ago by Lord Mansfield. But, as I have said, it is not merely recognition of the principle by the courts that is to be found in the books but recognition also, as I think, by Parliament. The Foreign Judgments (Reciprocal Enforcement) Act, 1933, was designed to enable persons who had obtained judgments in foreign countries with whom certain conventions had been made by His Majesty to enforce those judgments direct, that is to say, to execute them directly in this country without the necessity of obtaining first a judgment of the courts of this country. The kind of judgment which might be so enforced is defined or specified in section 1 (2) thus: "Any judgment of a superior

---

[57] [1950] A.C. 24, 36.

[58] [1920] 2 K.B. 287; sub nom. *Sota & Aznar* v. *Ralli Bros.*, 36 T.L.R. 456.

[59] [1950] A.C. 24, 46.

[60] Ibid. 57.

" court of a foreign country to which this part of this Act extends, " other than a judgment of such a court given on appeal from a " court which is not a superior court, shall be a judgment to " which this Part of this Act applies, if . . . (*b*) there is payable " thereunder a sum of money, not being a sum payable in respect " of taxes or other charges of a like nature or in respect of a " fine or other penalty." There is a similar reference in section 10 in regard to the issue of certificates of judgments obtained in the United Kingdom with the object of obtaining reciprocity in the foreign country. The matter is stated thus: " Where a judgment under which a sum of money is payable, " not being a sum payable in respect of taxes or other charges " of a like nature or in respect of a fine or other penalty, has " been entered in the High Court . . ." I am not, of course, suggesting that that Parliamentary language carries the present question any further than this: that it is an apparent recognition by Parliament of the special category, to say the least, into which claims for revenue or penalties are traditionally regarded as falling in this country, and, I think that I may add, in other countries. I have indicated that the rule is not, as I follow it, merely a rule of English municipal law. It is treated also as a rule of private international law.

With that introduction I refer to the passage in Dicey, 6th ed., p. 152, to which, in the 3rd ed., p. 230, Tomlin J. had referred in *In re Visser*[61]: " Rule 22. The court has no jurisdiction at common law to entertain an action—(1) for the " enforcement, either directly or indirectly, of a penal, revenue, or " political law of a foreign State." In the comment which follows there is set out a statement of Lord Loughborough: " ' The penal " ' laws of foreign countries are strictly local, and affect nothing " ' more than they can reach and can be seized by virtue of their " ' authority; a fugitive who comes hither, comes with all his " ' transitory rights; he may recover money held for his use, " ' stock, obligations and the like—and cannot be affected in this " ' country by proceedings against him in that which he has left " ' beyond the limits of which proceedings do not extend.' " I read that passage as supporting the view which I have intimated, that there is a good ground in justice for a rule such as this, even though, as I concede, there may be, from time to time, and perhaps here is, a hard case to be found.

[61] [1928] Ch. 877.

The passage in Dicey, as I have said, was accepted by Tomlin J., and I also accept it. Its counterpart in American law is to be found in Beale's Conflict of Laws (1935), vol. 3, p. 1635, and in the case (*Henry* v. *Sargent*[62]) to which Mr. Simon referred among others in *Municipal Council of Sydney* v. *Bull*[63] as establishing a formulation of the proposition which I adopt as correct. Beale refers first to the English decisions, at p. 1633, to which I have already made considerable allusion, and he then treats the matter as it has come before the courts in the United States, mentioning first *Henry* v. *Sargeant*.[64] The text of the book states: " The American cases treating this " problem begin with *Henry* v. *Sargent*.[64] In that case action " was brought against defendants, the selectmen of Chester " Vermont, to recover a tax which was claimed to have been " illegally assessed under Vermont law, and also to recover " damages for causing the arrest of plaintiff for refusing to pay " the tax. The New Hampshire Court examined the law of " Vermont and gave judgment for plaintiff. Parker C.J. said: " ' It is said that the court will not enforce the penal laws, or " ' the revenue laws, of another State. But this principle is not " ' applicable in this case, nor can it be true to that extent. " ' There is no attempt to enforce the penal or revenue laws of " ' Vermont in this action. If there were, it would be held that " ' this was not to be done through the instrumentality of the " ' courts of another State; as, for instance, if the attempt was " ' to collect a tax assessed in Vermont by a suit here.' "

The matter later came twice before the Circuit Court of Appeals in New York, and, as regards one of those cases, there is a citation of the basis of the rule by a very learned judge, Learned Hand J. He, concurring specially in the decision of the Circuit Court of Appeals, said: " ' While the origin of the " ' exception in the case of penal liabilities does not appear in the " ' books, a sound basis for it exists, in my judgment, which " ' includes liabilities for taxes as well. Even in the case of " ' ordinary municipal liabilities, a court will not recognize those " ' arising in a foreign State, if they run counter to the " settled " ' " public policy " of its own. Thus a scrutiny of the liability " ' is necessarily always in reserve, and the possibility that it will " ' be found not to accord with the policy of the domestic " ' State.' " I have read that passage out of respect to Learned

---

[62] 13 New Hamp. 321.
[63] [1909] 1 K.B. 7.
[64] 13 New Hamp. 321.

Hand J., but if that were the true basis of the rule, it would, beyond doubt, greatly limit its application. But as I understand the rule as applied in England, its origin is not of the limited character stated by Learned Hand J. However that may be, in the United States of America it is clear that the problem is apt to be, and frequently has been found to be, of a rather special character, because there the problem has arisen, as between States in the Union, whether there is an obligation upon the courts of one State to enforce the revenue claims or judgments of another State in the Union, having particular regard to article 4 (1) in the Constitution of the United States, known as the "Full faith "and credit clause." An example of that application of the problem came before the Supreme Court of the United States in *Milwaukee County* v. *M. E. White Co.*[65] There the question was whether the courts of one State ought to give effect to a *judgment* for tax made in another State. Article 4 (1) of the Constitution is expressed thus: "Full faith and credit shall be "given in each State to the public Acts, records and judicial "proceedings of every other State." It was held by a majority of the Supreme Court that, in the light of that provision, it was the duty of the State in question to give effect to the judgment for tax of another State, and the court expressly left open the question whether, either within or without the Union, the proposition that one State should not enforce the revenue claims of another State was to be treated as valid or not, and if not, to what extent.

It seems to me that these citations provide formidable and weighty authority for the acceptance, at any rate in this court, of the rule in the form in which I have stated it, and for the formulation of which I acknowledge my indebtedness to Lord Simon when at the Bar.

Mr. Mustoe has contended that whatever might have been the political philosophy justifying such a rule two hundred years ago, it has become archaic in existing conditions and disregards the obvious fact that from time to time the courts of this country may have to consider and do consider in detail the revenue laws of other countries, particularly countries adhering to the British Commonwealth. Mr. Mustoe has gone further and said that he has found indications in the books that judges have expressed the view that the scope of the rule in modern times should be reviewed. By way of example, he referred to *Ralli Brothers* v. *Compania Naviera Sota y Aznar.*[66] That was a case which involved the application of the principle which Lord Normand stated in a passage in the speech which I have already read, namely, that the courts of this country will not enforce a contract the performance of which, according to its terms, in a foreign country will be illegal in that place of performance. Scrutton L.J. said [67]: " In my opinion the law is correctly " stated by Professor Dicey in Conflict of Laws, 2nd edition, " p. 553, where he says: ' A contract . . . is, in general, invalid " ' in so far as . . . the performance of it is unlawful by the " ' law of the country where the contract is to be performed '— " and I reserve liberty to consider whether it is any longer an " exception to this proposition that this country will not consider " the fact that the contract is obnoxious only to the revenue " laws of the foreign country where it is to be performed as an " obstacle to enforcing it in the English courts. The early " authorities on this point require reconsideration, in view of the " obligations of international comity as now understood." Any observations of Scrutton L.J. deserve, and invariably obtain, the greatest consideration; but in my judgment what was in his mind was the broad scope which the words, unqualified and unexplained, of Lord Mansfield might bear; and he was not intending in any way to throw doubt upon the validity of the more limited proposition that the courts of this country will not be used as a means of collecting the revenue of a foreign country. Indeed, as I have already mentioned, in *Kahler's* case [68] in 1950, three members of the House of Lords obviously regarded that more limited principle as being well established.

---

[65] 296 U.S. 268.

If, then, the rule be well established and be correctly stated in the way I have stated it, what is the effect of section 302 of the Companies Act, 1948, which says that the property of the company shall be applied in paying all liabilities? It is said that that section requires every liability to be provided for, including a liability for tax due in a foreign country, particularly in a foreign country where the company has been trading and has earned the money in respect of which tax is assessed. It is said that that is so because, according to ordinary language and the ordinary interpretation of the section, such a claim as that with which we are concerned is a liability, notwithstanding the rule to which I have referred, and notwithstanding that it may be the fact that the Government of India may not, under the rule, be able to come to this country and directly sue to recover the sum due.

---

[66] [1920] 2 K.B. 287.

[67] Ibid. 300.

[68] [1950] A.C. 24.

I am unable to accept that view of section 302. In my judgment, and allowing for the fact that " liability " is a word of the widest import, and was deliberately used accordingly (see, for example, what Pearson J. said in *Gooch* v. *London Banking Association* [69]), if a liability or an obligation, such as that with which we are here dealing, is within the section, then it will follow that the liquidator has a statutory duty: he is, as has been said, a trustee under the statute in favour of the Government of India as a creditor. In other words, acceptance of the proposition that this claim is a " liability " within section 302 is inevitably acceptance also of the proposition that the claim is one which is enforceable in these courts by the Government of India, for the liquidator could then, and on this hypothesis, at the suit of the Government of India be compelled to give effect to the statutory duty or statutory trust in favour of the Government of India. I cannot accept the proposition that the liquidator ought to be treated as a trustee quoad the amount here claimed for the Government of India, while at the same time accepting the view that the Government of India could never as cestui que trust, or otherwise, enforce its claim. That seems to me to lead to an absurd conclusion.

Put, then, in another way, I think that the present claim made in accordance with the procedural provisions of section 307 of the Companies Act, 1948, is in substance and effect, though not perhaps in form, a proceeding to enforce, or to attempt to enforce, payment of the tax which the Government of India alleges to be due to it. In that connexion, I think, it is not irrelevant to observe that under the original counterpart of section 307, namely, section 138 of the Companies Act, 1862, it was not open to a creditor to make an application, though the liquidator or a contributory could do so in a form such as the present application. A creditor would have had to bring an action to recover his claim against the company, or I assume, if the liquidator had parted with the money, against the liquidator. He cannot now effectively bring any proceeding in that form, or if he did, it would inevitably fail. The difference, I think, is merely procedural. The substance of the matter is the same. The Government of India, claiming to be a creditor, is, by these means, which are the only means available to it, seeking to enforce the claim.

---

[69] (1885–6) 32 Ch.D. 47.

The result, in my judgment, is that, construing "liabilities" as I do, in the widest sense, so as to include present, future, and contingent liabilities, I think that it must nevertheless be construed so as to exclude claims which are not enforceable, according to the laws of this country, in the courts of this country. After all, by the terms of the Act, there is here an estate being administered, and prima facie, where an estate is being administered, whether it be the estate or property of a company in liquidation, or the estate of a deceased person, the rules governing the administration will be the rules applied by the lex fori, that is, the laws of the country where the property is being administered.

Thus, I think, there is a true and valuable analogy to be found by considering the case of a debt which is statute-barred according to the laws of this country. Wynn-Parry J., in *In re Art Reproduction Co. Ld.*,[70] decided that a liquidator in a voluntary winding-up of a solvent company could not pay a statute-barred debt without the consent of the contributories. We are not at the moment concerned, of course, directly with that matter, but I have always understood that statute-barred debts are not provable in the liquidation of a company. For the moment, however, I refer to this matter of statute-barred debts by way of analogy, and I have found assistance for present purposes in *In re Lorillard*.[71] The facts of that case were of a rather special character. A testator was domiciled in New York, but died in England, and he left assets and creditors in both countries. The principal administration was in the United States, but there was also administration of his estate in England, the English administration being, as was stated, ancillary to the American. It appears that the English administrator had discharged all the debts and had in hand a surplus which he was proposing to distribute among the English beneficiaries. The American estate was, however, less ample, and it had been exhausted without paying all the American creditors, in particular (and this is the significance of the case) without paying certain American creditors whose claims were good in America but which were bound to be defeated if prosecuted in England because they were barred here by the English Statute of Limitations. Two summonses were brought before Eve J. The first summons was by the administrator in England for directions as to what he should do with the surplus. It was asked whether he ought to pay it to the English beneficiaries, or whether he was precluded from doing that by the fact that he had notice of these creditors in America, even though they had deliberately abstained from trying to prove in the English administration. The second summons was a summons issued by the American administrator asking that the balance in the English estate might be ordered to be handed over to him. Eve J. treated the matter as one in his discretion whether he should order the English administrator to hand over the surplus to the American administrator, and, in his discretion, he answered the question negatively. The Court of Appeal expressed the view that there was no reason to interfere with the exercise of his discretion. But the significance of the matter is that in the judgments of Lord Sterndale M.R. and of Younger L.J. can be found references to the situation and rights quoad the English estate of these American creditors. Thus, Lord Sterndale said [72]: " There are debts in America which " according to English law are statute-barred, but not so accord-" ing to the law of New York. If claims in respect of these debts " had been made here they would rightly have been rejected." Then again later [73]: " The American creditors, however, did not " present their claims, presumably knowing that if they did so " they would be rejected." Younger L.J. said [74]: " The only " persons whom the American administrator claims to represent, " the so-called American creditors, would, if they brought in " their claims in this country, be defeated by the statute." Those remarks were directly relevant to the decision, because on the basis of those statements the judges in this court were saying: " Although the administrator here has notice of these claims " they are not enforceable here, and therefore he has no duty " towards these American creditors." That was a clearly relevant consideration in deciding whether this court would vary Eve J.'s decision when he directed the English administrator not to pay over to the American administrator but to hand over the surplus assets to the English beneficiaries. I find that case of assistance as indicating that in the administration of any estate, whether it is the property of a company in liquidation, or the estate of a deceased person, the question how it should be administered and, in particular, what liabilities ought to be accepted and discharged is prima facie a matter to be dealt with by the lex fori, that is, by the law of England.

---

[70] [1952] Ch. 89.

[71] [1922] 2 Ch. 638.

---

[72] [1922] 2 Ch. 644.

[73] Ibid. 645.

[74] Ibid. 646.

C. A.
1953

Delhi Electric Supply and Traction Co. Ld.; *In re.*

Evershed M.R.

Mr. Mustoe submitted that, even if the rule which found expression in *In re Visser* [75] is well established as a rule of common law, the effect of the Companies Act, 1948, and its deliberate use of the wide word " liabilities," was, for the purpose of that Act, to override the common law rule. He cited *Canadian Pacific Railway Co.* v. *Roy*,[76] which is an illustration of the well-known proposition that a corporation (for example, a local authority in common instances) which is given powers by statute to do particular things, cannot be held liable at common law for, say, nuisance, by properly doing that which the statute empowers the corporation to do or which the statute contemplates that the corporation should do. I accept, of course, the proposition that if the terms of the Companies Act, 1948, were clear and imperative they would necessarily supersede the common law rule. For example, if section 302 had said, " liabilities whether " enforceable in the courts of this country or not," there would be no room for an invocation of Lord Mansfield's rule; but, in my judgment, the terms of the section are not so clear and are not so imperative. Indeed, I find no difficulty in treating the use of the word " liabilities," consistently with giving it its widest scope, as meaning liabilities in the sense of claims capable of enforcement in these courts, and so as not to include every liability of every kind, such as a statute-barred debt or an obligation of a kind which no court of the country could ever enforce.

Mr. Mustoe finally argued that, accepting the rule as I have stated it, still it should not apply to States within the so-called " consortio " of the British Commonwealth. I can find no possible basis upon which a distinction can be drawn between States adhering to the British Commonwealth and other States. I have already said that this case may, in all the circumstances, appear to be a hard case, and I can see that in modern conditions there may be good arguments for some relaxation of the rule as between States of the Commonwealth. But that is plainly a matter to be regulated by executive action, by convention or agreement between governments, who could decide to what extent and subject to what conditions, if any, the revenue claims of one member State ought to be treated as enforceable in other member States.

I have assumed that we are here dealing with a sum certain which in India should be treated as having been due or as being due from the company to the Indian Government. It has been convenient so to treat it, though it is perhaps right for me to say that I understand that in fact the actual amount of the assessment is not yet finally determined. The liquidator obtained leave to challenge the amount of the assessment without prejudice to his contention (which was communicated in India to the authorities concerned) that in any circumstances no part of it could be admitted to proof. I mention the fact because Mr. Mustoe contended that certain observations to be found in letters, and in the declaration of solvency, and in the language of certain orders made, and the conduct generally of the liquidator, amounted in some way to an admission on the liquidator's part from which he could not now resile, and that that made this case an exception to the general rule which I have stated, even if the rule were otherwise applicable. In my judgment there is no ground for saying that any of the facts which I have mentioned amount to such an admission, or prevent the liquidator quite properly from taking the point which he has taken and contending that this debt cannot be admitted to proof.

---

[75] [1928] Ch. 877.

[76] [1902] A.C. 220.

The result is that I agree with the conclusion of Vaisey J. I agree with him also that the paucity of direct authority may well be due to the fact that for so long a period this rule has been regarded as too well established to make effective challenge possible. However that may be, I concur with the judge and with the reasons which he gave, and accordingly, in my view, this appeal fails and must be dismissed.

JENKINS L.J. I agree. The appeal raises in effect two questions: first, whether the claim made by the Government of India to tax assessed on the company under Indian law is in the eye of English law a claim enforceable by legal process in this country against the company or against its assets situated here; and second, if it is not, whether it is nevertheless a claim for which the liquidator should be held bound to provide as one of the "liabilities" of the company within the meaning of section 302 of the Companies Act, 1948.

As to the first question, Dicey's Conflict of Laws, 6th ed., p. 152, states the rule to be that the court has no jurisdiction at common law to entertain an action for the enforcement, either directly or indirectly, of a penal, revenue or political law of a foreign state. As regards penal and revenue laws (for with political laws we are not here concerned) I am satisfied that this proposition is well founded. Of the many authorities cited

C. A
1953

DELHI ELECTRIC SUPPLY AND TRACTION CO. LD., *In re.*

Jenkins L.J.

to us I need refer only to *Attorney-General for Canada* v. *Schulze*,[77] *Municipal Council of Sydney* v. *Bull*,[78] *In re Visser*,[79] and the observations made in *Kahler* v. *Midland Bank Ld.*[80] by Lord Normand,[81] Lord Reid,[82] and Lord Radcliffe.[83] These are passages to which my Lord has already referred, but I may perhaps be forgiven for repeating what was said by Lord Radcliffe[84]: "For my part, I should not regard the application of "this principle to this case as a concession of extra-territorial "operation to foreign currency regulations. I should regard it "rather as an insistence that in applying the proper law of a "contract—a conception which is inescapable in private inter-"national law—it is the full complex of substantive law that "must be applied. . . . But however that may be, I should not "have been prepared to treat such currency regulations as we "are concerned with here as if they were no more than the "'penal or revenue laws' of another State the existence of "which our courts are traditionally disposed to ignore."

The view taken in these cases seems on the whole to be borne out by the American decisions, to some of which we were referred, though, in cases arising as between different States of the Union, the issue is liable to be obscured by considerations turning upon the special relationship of such States to each other under the Federal Constitution. It is true that the earlier cases, which I do not propose to review in detail, while including decisions expressive of recognition of the existence of a rule broadly of this nature, provide no very satisfactory account of its origin, and, indeed, little or nothing in the way of actual authority for its application in circumstances at all resembling those of the present case. Its origin may perhaps be said to be lost in the mists of antiquity, and the best authority for it to reside in the consensus of opinion of generations of lawyers. Be that as it may, the later cases to which I have referred provide weighty recognition of its existence. I am satisfied, as was Tomlin J. in *In re Visser*,[85] that it does exist, and, in my view, its existence is called for by cogent considerations of convenience, international comity, and public policy.

Accordingly, I accept the rule and would respectfully adopt the restatement of it by Tomlin J. in *In re Visser*[85] at the conclusion of his judgment, in the passage which my Lord has already read [86]: " My own opinion is that there is a well-recog-" nized rule, which has been enforced for at least 200 years or " thereabouts, under which these courts will not collect the taxes " of foreign States for the benefit of the sovereigns of those foreign " States; and this is one of those actions which these courts will " not entertain."

---

[77] 9 Sc.L.T. 4.
[78] [1909] 1 K.B. 7.
[79] [1928] Ch. 877.
[80] [1950] A.C. 24.
[81] Ibid. 36.
[82] Ibid. 46.
[83] Ibid. 57.
[84] Ibid. 57.
[85] [1928] Ch. 877.

A third way of formulating the rule, which Lord Radcliffe seems to have had in mind in making the observation in *Kahler* v. *Midland Bank Ld.*,[87] is to state it as being to the effect that the law of England does not accord extra-territorial validity to the revenue legislation of foreign States. This mode of stating it may perhaps be said to have the merit of pointing to the reason why the courts of this country will not entertain proceedings to enforce, or act as collectors of, taxes imposed by the laws of foreign States.

I should add on this aspect of the case that the exception of judgments in respect of taxes and the like from the provisions of the Foreign Judgments (Reciprocal Enforcement) Act, 1933 (see section 1 (2) (*b*) and section 10 of that Act), affords some indication of statutory recognition of the rule. Accordingly, I answer the first of the two questions above posed in the negative.

As to the second question, that is to say, whether, given acceptance of the rule, the claim in respect of Indian tax is, nevertheless, one of the " liabilities " of the company for which the liquidator should be held bound to provide under section 302 of the Companies Act, 1948, I do not see how this can be. It is no doubt true that " liabilities " is a term of wide import (see *Gooch* v. *London Banking Association* [88]) but I think that its meaning must be limited to obligations capable of enforcement (whether immediately or prospectively or contingently) in the courts of this country.

Given the acceptance of the rule, the claim here in question cannot answer that description. Nor, in my view, is the argument for the Government of India advanced by the submission that upon the liquidation of a company its assets are subjected to a trust for the discharge of its liabilities, for if the trust is a trust for the discharge of the company's liabilities it cannot extend to claims which are not liabilities. On this aspect of the case I derive some assistance from analogy with a statute-barred debt, which cannot be paid, even in the winding up of a

---

[86] [1928] Ch. 884.

[87] [1950] A.C. 29, 36.

[88] 32 Ch.D. 41.

C. A.
1953

Delhi Electric Supply and Traction Co. Ld., *In re.*

Jenkins L.J.

solvent company, unless the contributories consent; *In re Art Reproduction Co. Ld.*[89]

Further, in my opinion, there is no distinction, for the purposes of the rule, between an action for enforcement of the claim against the company while it is a going concern, and an appeal to the court in the winding up of the company against the liquidator's rejection of a proof in respect of the claim. Both forms of procedure invoke the aid of the courts of this country to enforce the claim, and both have for their ultimate object a judgment or order for the payment by the company, or out of its assets, of the amount claimed. This seems to me to be directly obnoxious to the rule, even in the form in which it is stated in Dicey's Conflict of Laws, above cited. A fortiori, I think that an appeal to the court in the winding up of the company is obnoxious to the rule as restated by Tomlin J. in *In re Visser*,[90] for it clearly invokes the aid of the English court in the collection for the benefit of a foreign State of a tax imposed by the revenue laws of that State.

If the third method, suggested above, of stating the rule is accepted, then inasmuch as English law does not accord extra-territorial validity to the revenue laws of a foreign State, the short answer is that this claim, albeit enforceable against the company in India under Indian law to the extent of any assets of the company situated there, does not, in the winding up of this English company under English law, or in the distribution in the course of such winding up, and in accordance with English law, of its assets situated here, rank as a debt or liability of the company at all.

It is, in my view, nothing to the purpose to say that this is a liability enforceable under Indian law and that it must, therefore, rank as a liability in the winding up in England of this English company. The question whether it is to rank as a liability or not must be determined by reference to English law: see *In re Lorillard*,[91] where the Court of Appeal was clearly of opinion that debts owing in America, which were statute-barred according to English law, but not according to American law, would not be recoverable in the English administration of a deceased person's estate.

A subsidiary argument was raised on behalf of the Government of India to the effect that the liquidator had recognized or admitted the claim in such a way as to preclude him from now contesting it. I am satisfied that there is no substance in this contention. I am also in complete agreement with my Lord that India's membership of the British Commonwealth of Nations cannot of itself in any way affect the conclusion at which we have arrived. Accordingly, I would dismiss this appeal.

---

[89] [1952] Ch. 89.

[90] [1928] Ch. 877.

[91] [1922] 2 Ch. 638.

MORRIS L.J. Although my mind has been much exercised in regard to some aspects of this matter, I have reached the same conclusion. The survey of the authorities in the course of the submissions addressed to us has led me to the view that the rule which is recorded in *In re Visser* [92] is one which must be regarded as established in our law even if it were thought that its very first origins could not with certainty be discovered.

If some disadvantages can be pointed to as resulting from the rule, it can, with much force, be shown that these are offset and perhaps outweighed by considerations of convenience. Some of these considerations are recorded in Dicey's Conflict of Laws, 6th ed., p. 154. But whatever view may be held as to these matters, I consider that it is now too late successfully to submit that the rule has not been accepted in our law.

My Lord the Master of the Rolls has reviewed the cases, and I could not add anything to the reasoning, with which I am in agreement, by which the authoritativeness of the rule has been demonstrated.

The anxiety that I entertained during the arguments was whether, assuming that the principle or rule could not be impeached, it followed that the claim, or some claim, of the Government of India must be rejected.

I think that it is only fair to the liquidator to have in mind that the purchase price which was received by the company was transferred to this country long before the company began voluntary liquidation. Incidentally, the transfer also took place before the legislation was passed by which a capital gains tax was levied. We are, however, not in any way concerned with any question as to the quantum of any tax which may be due in India. The liquidator has very properly reserved and kept open the opportunity for challenging in India the correctness of the actual amount of the tax demanded. The matter must proceed before us on the assumption that some tax is due in India.

On this footing the issue before us depends upon the meaning of the word "liabilities" in section 302 of the Companies Act, 1948. In *In re General Rolling Stock Co.*,[93] James L.J., in

---

[92] [1928] Ch. 877.

[93] L.R. 7 Ch. 646.

C. A.
1953

DELHI ELECTRIC SUPPLY AND TRACTION CO. LD., *In re.*

Morris L.J.

dealing in that case with the language of section 98 of the Act of 1862, used these words [94]: "A duty and a trust are thus imposed "upon the court, to take care that the assets of the company "shall be applied in discharge of its liabilities. What liabilities? "All the liabilities of the company existing at the time when the "winding-up order was made which gives the right." If, in the light of this guidance, the word "liabilities" is given a wide meaning, does it cover a claim to tax by the applicant? It follows from acceptance of the rule or principle recorded that the applicant could not have sued the company in this country for tax. But on the assumption that some tax is owed in India, so that there is a liability in India, can it be said that such liability is denoted by section 302?

I have felt it a disturbing thought that a company incorporated in this country which has carried on its activities in another country may be allowed to end its existence without having discharged such financial obligations as it may be ascertained to owe to the government of that other country, though possessed of resources to discharge them. The question for decision is, however, whether, if the rule or principle recorded in *In re Visser* [95] is accepted, some tax owed abroad is covered by the word "liabilities" in section 302. If the rule may be regarded as having amongst its consequences the avoidance of situations of international embarrassment, then the disturbing thought to which I have referred can perhaps be offset by the consideration to which Vaisey J. referred in his judgment, that rules of general application sometimes press hardly one way and sometimes another.

I have come to the conclusion that if the claim of the applicant were allowed, subject to ascertainment of quantum, the substance and reality of the matter would be that the English court would be collecting tax for the benefit of another State. That would involve an invasion of the principle which, as I think, must be definitely recognized. I considered during the arguments whether it could be said that the English court in declaring what were the liabilities of a company which has operated in another country would have regard to the law of that country when fixing and declaring what liabilities must be allowed for proof as liabilities within section 302. But apart from any guidance which may be deduced from *In re Lorillard*, [96] to allow the present claim would inevitably, I think, violate the established principle. I am, therefore, of the opinion that the appeal does not succeed.

---

[94] L.R. 7 Ch. 648.

[95] [1928] Ch. 877.

[96] [1922] 2 Ch. 638.

Appeal dismissed.
Leave to appeal to House of Lords.

Solicitors: *Stanley Johnson & Allen; Sanderson, Lee & Co.*

E. D.

In re OLD SILKSTONE COLLIERIES LD.

[1953 No. 00402.]

C. A.
1953
Nov. 30;
Dec. 1, 2.

Evershed M.R., Jenkins and Morris L.JJ.

Company—Reduction of capital—Colliery company—Assets of company taken over by National Coal Board—Preference capital reduced on footing that right to claim adjustment of compensation unaffected—Resolution for repayment of preference stock in full—Validity—Whether reduction just and equitable—Terms of earlier company's circular—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *ss.* 66, 67—*Coal Industry Nationalization Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 59), *s.* 25.
Company—Shares—Preference. Coal—Nationalization—Compensation.

Under the provisions of the Coal Industry Nationalization Act, 1946, on January 1, 1947, the business of Old Silkstone Collieries Ld. vested in the National Coal Board and thereafter the company only continued in order to collect the compensation to which it had become entitled under that Act with a view to ultimate liquidation. Under article 6 of the articles of association of the company the special rights attached to any class of stock might, (with the sanction of an extraordinary resolution passed at a separate general meeting of such holders,) but not otherwise, be abrogated or modified.

By a circular letter dated July 28, 1950, to the stockholders, the board recommended repayment of 10s. to the two classes of preference stockholders for every £1 of stock held by them, and it was stated in that circular that it was the board's intention that any rights preference stockholders might have under section 25 of the Coal Industry Nationalization Act, 1946,[1] should be retained until the amount of

---

[1] Coal Industry Nationalization Act, 1946, s. 25: "(1) Provision shall "be made by regulations for due "regard being had, as between classes ". . . of members . . . of a company "being an owner of transferred "interests, to what their relative "expectations of income yield from "their respective interests in the "company would have been if this "Act had not been passed, and for "that purpose the regulations shall "provide facilities for adjusting the "respective interests of such classes "in the company's assets as affected "by the substitution of the compensation under this Act for the "transferred interests of the company

C. A.

1953

OLD SILKSTONE COLLIERIES LD., *In re.*

the compensation payable to the company had been determined. By a special resolution of August 22, 1950, passed at an extraordinary general meeting of the company the capital was reduced accordingly. That resolution provided that, notwithstanding the reduction, the holders of the two classes of preference stock " shall remain entitled " to claim the same adjustment of their interests as could have " been claimed under section 25 " of the Act of 1946 " as if the said " reduction of capital had not taken effect." By a circular of September 21, 1951, the board recommended repayment of 5s. to the preference stockholders for every 10s. of stock held by them, and that circular also contained the same saving provision with regard to their rights under section 25 of the Act of 1946. A special resolution was duly passed on October 16, 1951, giving effect to that reduction. It contained a similar saving of the preference shareholders' rights under section 25 to that contained in the first resolution. Both those reductions of capital were duly confirmed by the ✓ court.

On April 24, 1953, the directors issued a third circular to the stockholders in which they stated that they had given consideration to the terms of repayment of the preference stocks and that they were of opinion that the rights of such stockholders under section 25 of the Act of 1946 had no monetary value, and they proposed repayment at par. No special meetings were called of the first and second preference stockholders, but by a special resolution of the company passed at an extraordinary meeting of the company held on May 19, 1953, it was resolved that the capital of the company be reduced by repaying to each holder of first and second preference stock the whole paid up capital of the holding of such stockholder. By the petition the company asked the court to approve such reduction:—

Held, first, that the resolutions of 1950 and 1951 attached special rights to the two classes of preference stock—that the holders respectively remained entitled to claim the same adjustment of their interest as could have been claimed under section 25 of the Act of 1946 if the reduction of capital had not taken effect—and that those rights had been modified or abrogated or prejudicially affected by the third resolution for reduction which purported to extinguish those stocks. In order, therefore, to carry out the reduction, it was necessary to hold separate meetings of the two classes of preference stockholders in accordance with article 6 and to secure the approval of the two classes of stockholders to the proposals by the requisite majorities. This not having been done, the resolution for reduction had not been validly passed.

Scottish Insurance Corporation Ld. v. *Wilsons & Clyde Coal Co. Ld.* [1949] A.C. 462; 65 T.L.R. 354; [1949] 1 All E.R. 1068, and *Prudential Assurance Co. Ld.* v. *Chatterley-Whitfield Collieries Ld.* [1949] A.C. 512; [1949] 1 All E.R. 1094 distinguished.

" so as to give effect, so far as may " be, on the one hand to the said " expectations and on the other hand " to the rights of priority conferred " on such classes respectively by . . . " the memorandum and articles of " association of the company."

Held, secondly, that, if the resolution for reduction had been validly passed, the terms of the circulars issued by the company's board in 1950 and 1951, in effect, asked the preference stockholders to submit to reductions of capital upon the understanding that they were to remain entitled to claim in adjustment proceedings on the basis of the amount of their respective holdings. Those representations having been acted upon by the two classes of preference stockholders in submitting to the reductions under the two earlier schemes, the company could not, in good faith, bring about (by the resolution of May 19, 1953) the total extinguishment of the capital paid up on their stocks. This was not therefore a case in which the court in its discretion should confirm the proposed reduction.

Observations of Bowen L.J. in *Birmingham & District Land Co.* v. *London and North Western Railway Co.* (1888) 40 Ch.D. 268, 286, applied.

Observations of Maugham J. in *In re Dorman, Long & Co. Ld.* [1934] Ch. 635, on explanatory circulars sent out by the board of a company, applied.

Decision of Vaisey J. reversed.

APPEAL from Vaisey J.

This was an appeal by the first and second preference stockholders of the Old Silkstone Collieries Ld. against a decision of Vaisey J. confirming a reduction of the capital of the company upon certain terms.

The following statement of facts is taken from the judgment of Evershed M.R.: The company, before the coming into effect of the Coal Industry Nationalization Act, 1946, was concerned with the business of coal mining. Its commercial history showed that until not long before that Act came into operation its success had not been of a very outstanding character, a fact illustrated by the circumstance that during the years 1944 and 1945 none of its shares ever stood on the Stock Exchange at a price equivalent to par; but towards the end of its commercial life the company had in fact begun to work upon profitable seams of coal, so that its prospects, from the commercial point of view, had become much more promising. But whatever might have happened to this commercial adventure had it not been for the Act of 1946, it was not disputed that the coming into operation of that Act had put an end altogether to the company's commercial activities. It was not suggested that the company proposed or ever had proposed to continue in business in some other form. When all the compensation had been received, the company intended to go out of existence, and to divide all its surplus assets among its stockholders.

It was in anticipation, therefore, of that final demise that in the summer of 1950 the company put forward the first of its reduction proposals. At that time the issued paid up capital of the company consisted of £198,780 of first preference stock, an exactly similar amount of second participating preference stock, and £158,854 5s. of ordinary stock. There was in addition a considerable amount of nominal but unissued capital, which had no relevance in the present proceedings.

The rights of these respective classes of stockholders had been varied from time to time. In July, 1950, the first preference stockholders were entitled under the articles to a fixed cumulative preferential dividend of six per cent. on the amount paid up (or credited as paid up) on the stock, but to no further right of participation in the company's profits, and upon a winding up to repayment of the capital paid up in priority to all other stockholders, but to no further participation in the surplus assets of the company. Their voting rights were strictly limited by the amended article 65, which was to the effect that they were not entitled to attend and vote at general meetings of the company unless the preferential dividend was in arrear to the extent there stated, or unless the business of the meeting included "the consideration of a resolution directly and prejudicially "affecting the special rights attached to" that stock.

The second preference stock carried the right to a five per cent. non-cumulative preference dividend ranking after the preferential dividend on the first preference stock, but with a further right to participation in the profits of the company pari passu with the ordinary stockholders up to, but not beyond, a further five per cent. on the paid up capital on the second preference stock. The second preference stockholders, like the first preference stockholders, were not entitled in a winding up to any participation in the surplus assets of the company beyond the amount required to repay the paid up capital on their stock, to which they were entitled in priority to the ordinary stockholders. Their voting rights were more extensive than those of the first preference stockholders, in that there was no limitation to their right to attend and vote at ordinary meetings of the company.

Article 6 of the articles of association provided: "If at any "time the capital of the company is divided into different classes "of shares, the special rights attached to any class may either "with the consent in writing of the holders of three-fourths of "the issued shares of the class, or with the sanction of an extraordinary resolution passed at a separate general meeting of such "holders (but not otherwise) be modified or abrogated." That article was made applicable in the case of stock as well as of shares. Article 48 of the company's articles of association conferred a power to reduce its capital by special resolution.

On occasions on which all the stockholders would be entitled to vote, each preference stockholder was entitled to one vote for every £1 of stock, whereas each ordinary stockholder was entitled to one vote for every one shilling of stock. The effect of that was to give for voting purposes a voting power to the ordinary stockholders represented by multiplying by twenty the figure of £158,000 odd of ordinary stock.

The vesting date for the purpose of the Coal Nationalization Act, 1946, was January 1, 1947. At the date of the first reduction of the company's capital in 1950 the recovery by the company of the compensation for the transfer from it to the State of its coal mining undertaking had not advanced very far. Indeed, the total amount of compensation payable to the company had not been settled at the date of these proceedings. What it might ultimately amount to was a matter of some doubt. The claim or claims put forward by the company exceeded by a very large amount the figures which the National Coal Board had intimated as the sum properly payable, or (at least in one case) which the valuers appointed under the Act had been disposed to award. Appeals had been entered against the findings which had so far been made. To give one example of the difference in figures; the company's estimate of value for its coke ovens and chemical works was £295,000. The National Coal Board's valuation for the same item was £38,000. The Yorkshire District Valuation Board's draft valuation was £90,000, which last figure had, however, been increased as the result of a hearing to £95,000. The total sum which the company would ultimately receive remained uncertain. If the estimates put forward by the company were eventually to prevail, it seemed reasonable to suppose that there would be a very substantial distributable surplus in the hands of the company after the paid up capital had been repaid, whereas, if the more gloomy prognostications of the National Coal Board were to prevail, the total available surplus would obviously be of a very much reduced character.

It was in these circumstances that the circular of July 28, 1950, was sent. The then chairman thus expressed himself to all the stockholders: "You will recollect that in my statement "circulated on May 1, 1950, with the 1949 accounts, I stated "it was the intention of the board to submit to stockholders a "repayment of capital scheme. The company has substantial "liquid funds which have accumulated from cash received for "compensation in respect of stocks of stores, wagons, etc. "Additionally, a substantial loan from the parent company to a "wholly-owned subsidiary has been repaid. Your board has "therefore decided to recommend that in the interests of the "company and the stockholders the moneys for which the "company has no present use shall be applied to the repayment "of 10s. to the first preference stockholders and second participating preference stockholders for every £1 of such stock "held by them.

"Section 25 of the Coal Industry Nationalization Act, 1946, "provides for the adjustments of rights as between the holders "of preference and ordinary stocks. It is your board's intention "that any rights stockholders may have under section 25 shall "be retained until the amount of compensation payable to the "company is determined. Whilst the proposal to repay 10s. per "£1 of stock to both classes of preference stockholders is not "strictly in accord with the rights of first preference stockholders "under the company's articles of association, in that they are "entitled to prior repayment of capital, your board draw attention to the fact that if the whole of the first preference stock "was repaid, these stockholders would be deprived of any rights "which they may have under section 25 as the stock would cease "to exist. The funds which will be available for stockholders on "determination of final compensation will be such that no "prejudice can result to the priority rights of the first preference "stockholders by the scheme now submitted. The proposals "involve a payment of £198,780 which is available without "resort to a claim for partial compensation by the parent "company."

Enclosed with that circular were notices of extraordinary general meetings first of the first preference stockholders, second of the second participating preference stockholders, and finally of the company. Since it was apprehended that the repayment was otherwise than in strict accordance with the stockholders' rights under the articles, the terms of article 6 made it necessary that the proposal should have the sanction of extraordinary resolutions duly passed at separate meetings of both classes of preference stockholders, and the provisions of article 65 made it necessary for the first as well as the second preference stockholders to attend the meeting of the company for reduction.

The resolution for reduction, which was to be submitted to the extraordinary general meeting of the whole company held on August 22, 1950 (all the stockholders, preference and ordinary, being treated as entitled to vote at it) took, so far as relevant, this form: "That the capital of the company be reduced," and then was set out the reduction scheme under which each class of preference stockholders suffered a 50 per cent. reduction of the paid up capital. Then there followed the words: "but so "that notwithstanding such reduction of capital the holders of the "said first preference stock, second participating preference stock "and ordinary stock shall respectively remain entitled to claim "the same adjustment of their interest as could have been "claimed under section 25 of the Coal Industry Nationalization "Act, 1946, if the said reduction of capital had not taken effect." That reduction of capital was duly confirmed by the court.

Slightly more than a year later the second stage in the gradual process of total liquidation was reached. The present chairman, who had become chairman on the death of the previous chairman, then sent to the stockholders a circular following in some respects closely the circular which had been sent by his predecessor. It was dated September 21, 1951, and opened thus: "Further proposed part repayment of capital. You will "recollect that following the authority of class meetings of first "preference stockholders and second participating preference "stockholders held on August 22, 1950, a repayment of 10s. to the "first preference stockholders and second participating preference "stockholders for every £1 of such stock held by them on "October 31, 1950, was made on November 1, 1950." Then he stated that the company has now received £100,000 Treasury Stock in part satisfaction of compensation.

"Your board has decided to recommend that in the interests "of the company and the stockholders, the money for which "the company has no present use shall be applied to the repay"ment of 5s. to the first preference stockholders and second "participating preference stockholders for every 10s. of such "stock held by them." Then occurred this reflection of what had been said on the previous occasion. "Section 25 of the Coal "Industry Nationalization Act, 1946, provides for the adjustment "of rights as between the holders of preference and ordinary "stocks. It is your board's intention that any rights stockholders "may have under section 25 shall be retained until the amount "of compensation payable to the company is determined. Whilst "the proposal to repay 5s. per 10s. of stock to both classes of "preference stockholders is not strictly in accord with the rights "of the first preference stockholders under the company's "articles of association, in that they are entitled to prior repay-"ment of capital, and therefore requires consent of class meet-"ings, your board draw attention to the fact that if the whole "of the first preference stock was repaid, these stockholders "would be deprived of any rights which they may have under "section 25 as the stock would cease to exist."

The chairman then referred to the enclosed notices and said in regard to them: "These"—that was, the resolutions—"pre-"serve the rights (if any) of preference stockholders under "section 25, cover the necessary alterations in the company's "articles of association regarding capital, and preserve the exist-"ing voting power of stockholders." Again, having regard to the fact that the proposals departed from the strict rights inter se of the stockholders, article 6 was regarded as applicable, and separate extraordinary meetings were held of each class of preference stockholder.

The form of resolution proposed for the company at an extraordinary meeting of the company held on October 16, 1951, followed in form almost identically the form on the previous occasion. The result was to reduce the preference stock by 50 per cent. of what remained—that was to say, to 25 per cent. of what it had originally been. Again at the end of the essential resolution was the sentence: "but so that notwithstanding such "reduction of capital the holders of the said first preference stock "and second participating preference stock shall respectively "remain entitled to claim the same adjustment of their interest "as could have been claimed under section 25 of the Coal "Industry Nationalization Act, 1946, if the said reduction of "capital had not taken effect." In the proviso in that case there was omitted any reference to the ordinary stockholders as occurred in the first resolution; but it was agreed that nothing in the circumstances that was relevant to this appeal turned upon that fact.

That reduction of capital, like its predecessor, was duly confirmed by the court.

By a circular dated April 24, 1953, the directors advocated a further reduction of capital after payment off of the two classes of preference stock. The circular stated, among other things: "Your directors and their professional advisers have given very "careful consideration to the terms of repayment of the prefer-"ence stock. The company's articles of association specifically "provide for repayment at par. The previous capital repayments "preserved the rights (if any) of the preference stockholders "under section 25 of the Coal Industry Nationalization Act, "1946." Then that section was set out and a reference was made to the regulations which had been made under that section. There was then a statement showing the actual dividends paid in the years 1938 to 1946 inclusive on all three classes of shares. They showed that the first preference shares received altogether over those years 58½ per cent. in dividends, the second preference shares received approximately 50 per cent. in dividends, including their further participation, and the ordinary stockholders about half that amount, 24 per cent. Then came the sentence: "Your directors and their professional advisers "are therefore of the definite opinion that no monetary value "can be attached to the first preference stock and second participating preference stock as to any right which may exist "under section 25 (1) of the Coal Industry Nationalization Act, "1946. Accordingly, they propose repayment at par. These "proposals have been submitted to and discussed with the "Association of Investment Trusts and the British Insurance "Association Investment Protection Committee who are "recommending their interested members to vote in favour of "the resolutions to be proposed at the extraordinary general "meeting and to take no part in promoting or supporting any "proposal for an adjustment scheme. The use of an adjustment scheme would only invoke long delay and expense and "in view of the foregoing, it is hoped that the preference stockholders will accept the proposed repayment terms."

No separate meetings were called of the two classes of preference stockholders, but at an extraordinary meeting of the company held on May 19, 1953, at which the second preference stockholders were entitled to be present and vote, but not the first preference stockholders, a resolution was passed that the capital of the company be reduced by repaying to each holder of the first and second preference stock the whole nominal amount of the holding of such stockholders by cancelling and extinguishing the first and second preference stock.

By this petition the company asked that the reduction proposed to be effected by the special resolution might be confirmed. The petition was opposed by a number of preference stockholders of both classes, on the grounds: first, that the resolution for reduction had not been duly passed; secondly, that the circular of April 24, 1953, was misleading; and thirdly, that the proposed reduction was unfair.

Vaisey J. confirmed the reduction of capital, but upon the terms that it was not to prejudice the rights of the first and second preference stockholders under section 25 of the Coal Industry Nationalization Act, 1946.

Certain of the preference stockholders appealed. The company cross-appealed against so much of Vaisey J.'s order as reserved the rights of the preference stockholders under section 25 of the Act of 1946. At the hearing neither side contended that, having regard to the terms of section 25, it was competent to the court to preserve the rights of stockholders after all their capital had been repaid to them.

James Strangman Q.C. and *P. R. Oliver* for the preference stockholders. The preference stockholders oppose on three grounds this petition for the reduction of the company's capital by repaying all the preference stock. First, they contend that the reduction is unfair to them, because they will lose all right to claim an adjustment under section 25 (1) of the Coal Industry Nationalization Act, 1946. When they consented in 1950 and 1951 to have their stock reduced they did so on the faith of the statement that their rights under section 25 would be preserved. This is a case of quasi-estoppel. The company should be compelled by a court of equity to give effect to the representations which it made when the previous resolutions were passed. Reliance is placed on the passage in the judgment of Bowen L.J. in *Birmingham and District Land Co.* v. *London and North Western Railway Co.*,[2] where he said that where persons having contractual rights against others induce them to believe such rights will not be enforced, such persons shall not be allowed by a court of equity to enforce their rights without placing those other persons in the position in which they were before.

Secondly, it is contended that the resolution of May 19, 1953, was not validly passed because the first preference stockholders did not attend the meeting of the company at which it was passed. Further, the resolutions of August 22, 1950, and of October 16, 1951, conferred special rights on the preference stockholders. Accordingly, those rights could not be modified or abrogated unless the preference stockholders had consented to their modification or abrogation at separate meetings of the stockholders held in accordance with the provisions of article 6 of the company's articles of association. The facts of the present case are distinguishable from those considered by the House of Lords in *Scottish*

---

[2] (1888) 40 Ch.D. 268, 286.

Insurance Corporation Ld. v. *Wilsons & Clyde Coal Co. Ld.*[3] and in *Prudential Assurance Co. Ld.* v. *Chatterley-Whitfield Collieries Ld.*[4]

Thirdly, the preference stockholders object to the terms of the circular of April 24, 1953. That circular was misleading in that it stated that the Association of Investment Trusts and the British Insurance Investment Protection Committee recommended their members to support the scheme, without stating the extent of the holdings of such members. In fact the members of those associations had only very small interests in the company. [Reference was made to *In re Barrow Hæmatite Steel Co.*[5]; *In re Dorman, Long & Co. Ld.*[6]; and *Birmingham and District Land Co.* v. *London and North Western Railway Co.*[7]]

Sir Andrew Clark Q.C. and *P. J. Sykes* for the company. The contention that the effect of the resolutions of 1950 and 1951 was to confer special rights on the preference stockholders is unsound. The resolutions did no more with regard to rights under section 25 of the Act of 1946 than to state what the law was in any event. These provisions with regard to the section were in fact otiose. The language used did not modify the respective rights of the preference and ordinary stockholders. If the resolutions conferred any rights, they did not confer any rights special to the preference stockholders. They merely preserved the rights of all classes of stockholders. There is nothing in the resolutions of 1950 and 1951 to prevent the company from again reducing its capital. All that the resolutions meant was that the preference stockholders' rights were to remain until modified in the future.

With regard to the allegation that the proposed reduction is unfair. The short answer is that the right of the preference stockholders under section 25 is so speculative as to be for all practical purposes worthless. To deprive them of such a right cannot be unfair. It appears from the decisions of the House of Lords in the *Scottish Insurance* case[8] and the *Prudential Assurance* case[9] that the existence of rights under section 25 does not of itself render unfair a scheme which deprives the shareholders of a company of these rights.

The circulars which were issued correctly set out the intentions of the directors of the company at the time of their issue. The directors could not bind themselves not to change their minds in the future. The principle of *Jorden* v. *Money*[10] applies. The directors had no power to alter the articles of the company by their representations. It would have been unfair to the ordinary shareholders for the directors to have saddled them with an obligation to continue to pay high dividends to preference stockholders indefinitely. There was no justification in the language of the circulars for the preference stockholders interpreting them as an undertaking that their rights would not be prejudicially affected in the future. The statements in the circulars could not prevent the company reducing its capital in any way authorized by law, or render it unfair for the ordinary shareholders to exercise their legal rights to do so. The circular of 1953 was not misleading. The company and its directors have done nothing unfair. This appeal should be dismissed.

---

[3] [1949] A.C. 462; 65 T.L.R. 354; [1949] 1 All E.R. 1068.

[4] [1949] A.C. 512; [1949] 1 All E.R. 1094.

[5] [1900] 2 Ch. 846.

[6] [1934] Ch. 635.

[7] 40 Ch.D. 268.

[8] [1949] A.C. 462.

[9] [1949] A.C. 512.

James Strangman Q.C. in reply. The rights of the preference stockholders under section 25 were not treated as valueless in 1950 and 1951, and should not be so treated during the short period before a claim for adjustment may be made. There is no substance in the objection that it would be unfair on the ordinary stockholders that they should be bound by the representations of their directors. The company has not established that the preference stockholders' rights under section 25 are valueless. The proposed reduction will operate unfairly and the court should not sanction it.

EVERSHED M.R. This is an appeal from an order made by Vaisey J. on July 13, 1953, whereby he confirmed a reduction of the capital of Old Silkstone Collieries Ld. to the extent stated in the order, but subject to the following proviso: "Provided "that such reduction of capital is to be without prejudice to such "(if any) rights as the first preference stockholders and second "participating preference stockholders respectively of the com-"pany have or would have had under section 25 of the Coal "Industry Nationalization Act, 1946, if the reduction of capital "hereby confirmed had not been effected and so that for the "purpose of the said section and for that purpose only the holders "of the said preference stocks at the date of this order their "executors administrators and assigns are to be deemed to be "and to continue to be in possession of their respective holdings "of such preference stocks respectively notwithstanding that the

---

[10] (1854) 5 H.L.C. 185.

"whole of the capital paid up on such holdings shall have been "returned by virtue of the said resolution and this order."

In reference to that proviso, the judge, after saying that there was great force in the objections which had been put forward on behalf of the preference stockholders, continued: "I should "be extremely reluctant, and, indeed, should probably refuse "to confirm this reduction, if the result were to be what the "objectors anticipate; but I have come to the conclusion that "it is possible to deal with this case in a way which will obviate "the difficulty altogether"; and the way in which he did deal with it (and which he hoped would obviate the difficulty) was by adding the proviso which I have read.

Mr. Strangman, for the objecting preference stockholders, has argued that the proviso inserted by the judge would be in fact ineffective to achieve the end intended, because the extinction of any stockholding in the preference stockholders at the time when any application under section 25 of the Coal Industry Nationalization Act, 1946, was made would disable them from having any locus standi before the tribunal. Sir Andrew Clark, for the company, agrees with Mr. Strangman that the proviso, upon which the judge pinned such hopes, would be ineffective. We have, therefore, unfortunately had to consider this matter on the footing that that is so. From the short passage which I have read, if the judge had been of opinion that he could not, as he said, obviate the difficulty, it is at the very least doubtful whether he would ever have confirmed the reduction; and it has become necessary, accordingly, for this court, in the light of the concession made by both sides, to consider what ought to be done.

Two quite distinct points have been raised by the appellants. It is said first, that as a result of certain previous reductions of capital, there was created in favour of each class of preference stockholders a special right within the meaning of the company's articles of association, so that, by the terms of the articles, it was incompetent for the company effectively to resolve upon the now proposed reduction of capital save, inter alia, with the assent of separate meetings of the classes of preference stockholders concerned. If that view is right, it is not in doubt that this petition must be refused, since there were no such separate meetings of the two classes of preference stockholders. Secondly, the appellants have contended that, even if no such special rights were created, still, in all the circumstances of this case, the court, in the exercise of its discretion, ought to refuse its sanction to this proposal on the general ground that it is not fair or equitable as between the classes of stockholders concerned.

As the judge in the circumstances expressed no concluded view on either point, we have thought it desirable that we should express a view on both points, though, as it is our view that Mr. Strangman is entitled to succeed on the first point, in strictness it is not necessary to express any view on the question of fairness. Still, it may be desirable in the interests of the company itself that we should give reasons for a conclusion on both matters, so that they may regulate their affairs hereafter in accordance with our view.

[His Lordship read section 25 of the Coal Industry Nationalization Act, 1946, stated the facts and read the circulars and resolutions of 1950 and 1951 and continued:] The first question, therefore, which the court has to decide, is: did those resolutions have the effect of creating in each class of preference stockholder a special right, something which they had not got before, and a right peculiar to their stocks respectively? If so, it is conceded that the total elimination of the preference capital was incompetent without the approval of the preference shareholders under article 6.

In my judgment, that was their effect. But, before I state my reasons (as I think that I can quite briefly), I should lay a foundation to what follows, both on this point and in some measure on the second point of general fairness, by a reference to two cases in the House of Lords, *Scottish Insurance Corporation Ld.* v. *Wilsons & Clyde Coal Co. Ld.*,[1] and, immediately following, *Prudential Assurance Co. Ld.* v. *Chatterley-Whitfield Collieries Ld.*[2] Those were cases in which schemes for reduction of capital came before the House, in the first case from the Inner House of the Scottish Court of Session, and in the second case from this court. In both cases the argument for the objectors was that the proposal was unfair, in part at least for this reason: that a reduction scheme involving total repayment of the preference shareholders would disqualify them from any right of making a claim for adjustment under the Coal Act of 1946 and was, therefore, unfair and inequitable. The House took the view that those objections were unfounded. In the course of the speeches in the first case, expressions fell from all their Lordships which must have somewhat dashed the hopes which preference shareholders may have

[1] [1949] A.C. 462; 65 T.L.R. 354; [1949] 1 All E.R. 1068.

[2] [1949] A.C. 512; [1949] 1 All E.R. 1094.

entertained that some considerable fruit was necessarily to be gathered from the provisions of section 25 and the regulations made thereunder. But it would, I think, be going too far to suggest that their Lordships indicated that, in such a case as the present, preference stockholders could in no circumstances have any valid expectation of recovering any compensation or adjustment under that section and the regulations made thereunder. If they had so indicated, it seems to me they would have rendered parliamentary intention, as expressed in section 25, almost wholly nugatory.

What, I think, fairly summarizes the views which their Lordships expressed is to say that the expectations which may be entertained by preference stockholders (or, indeed, any class of members of a company) under that section must be, at the present time at any rate, doubtful and speculative. I take as an example the language of Lord Normand in the first case. He said[3]: "If "that section opens to the preference stockholders a prospect of "advantage, of which they could be deprived only by a reduction "of capital involving the extinction of their shares before liquida-"tion, I would be prepared to hold that the reduction was unfair. "But neither section 25 nor the regulations, which have been "made under it since this case was before the Court of Session, "justify any firm expectation of advantage to the preference "stockholders. How the regulations will be applied by the tri-"bunal is a matter of doubtful speculation." Then he went on to say that, in that case, he thought that the ordinary stockholders were not bound to await the operation of those regulations before exercising the powers which they had under the articles of the company in question.

It is the substance and gist of Sir Andrew's argument on this point that the provisos to the two resolutions of 1950 and 1951 introduced by the words "but so that" serve at most as a mere declaration of the existing statutory right, whatever it is, and speculative as it certainly is (according to the speeches in the House) arising out of the section. But I think the argument overlooks first that, whatever might be the nature and value of the statutory right, the incorporation of these terms into the resolution makes it, in effect, a special right attached to these shares. Whether that alone would suffice for the purposes of the present appeal, it is unnecessary to state. For, in my judgment, the words which have been used go further. I think that it is impossible to read those words as meaning otherwise than this: that, notwithstanding the reduction, the preference stockholders are entitled to make their claim on the footing that they are still proprietors of the amount of stock which they would have held had there been no reduction of their capital at all. Indeed, Sir Andrew, as I followed him, expressly so conceded. The material words are "but so that notwithstanding such reduction of capital the holders "of the first preference stock"—I take them by way of illustration—"shall respectively remain entitled to claim the same "adjustment of their interest as could have been claimed under "section 25 of the 1946 Act if the said reduction of capital had not "taken effect."

---

[3] [1949] A.C. 462, 498.

After the resolution of 1951 the holdings of the first preference stockholders had been reduced to 25 per cent. of their original amount, but I read the proviso as stating that, notwithstanding that reduction, for the purposes of making their claim under section 25 and vis-à-vis the ordinary stockholders, they are entitled to present that claim on the footing that they hold four times the amount of the stock which at the material date they would in fact hold. Put in another way, it would be equivalent to saying that, for the purposes of such an application, they would be holders of first preference stock conferring the right of a fixed preferential cumulative dividend at the rate not of 6 per cent. but of 24 per cent. What effect that would have, in the circumstances of the case, on the mind of the tribunal, which is given the task of deciding the question posed in section 25, it is not necessary to decide; but I find it impossible to reject the view that, by giving to them that special right or privilege, the preference stockholders have had created in their favour a special right (how valuable it is unnecessary to state) within the meaning of articles 6 and 65 of this company's articles of association.

It is said by Sir Andrew that, assuming, as he concedes, the meaning of the resolution to be as I have stated it, still it is merely declaratory of the words of the section; but with that contention I am unable to agree. I go this far with Sir Andrew, that, having regard to the terms of the section, the estimation of expectation of income is to be made as though the Coal Industry Act had not been passed; that is to say, by having regard to what those expectations would have been on January 1, 1947. But I am unable to go on from that to hold that a stockholder who, between January 1, 1947, and the date of his application has suffered a reduction by payment off of his capital by 75 per cent., is by the section entitled to prefer his claim on the footing that no such reduction had taken effect. It seems to me not in doubt that for any stockholder to qualify as an applicant under the section, he must be a member of the company at the time of his application and a holder of shares of the class in respect of which the application is made. For that reason, it is conceded here that the proviso which the judge introduced into his judgment would not be effective, because (it is said) the proviso could not make into members persons who had ceased to be members; but it does not seem to me to follow that the claimant is to be treated as though he held the amount of stock which he happened to hold six years ago and before any reduction took effect.

Some argument was also addressed to us about the meaning of the word "relative" in the phrase "their relative expectations "of income yield," but it does not seem to me that anything turns upon it. It seems clear that the function of the tribunal is to attempt, so far as may be (to use the language of the section) to give effect as between the competing claims of two classes of shares, on the one hand, to their respective or relative (and it may be the words are synonymous) expectations of income yield, and at the same time to their respective or relative rights under the articles in regard to repayment of capital and otherwise.

One final point may be mentioned. It was said by Sir Andrew that, assuming everything else against him, still the effect of the last words in the resolution did not import any such permanence in their effect as to give any special right; in other words, that they merely said, in effect, that the rights of the preference stockholders would be as stated until such time as the company, in exercising its power aliunde in the articles, chose to put an end to them. I doubt whether that helps the company's argument, because so long as they remain, if I am right so far, these are special rights which can only be taken away under the articles by observing the restrictions of article 6; but I also think, as my brother Jenkins observed during the argument, that in its context the word "remain" should fairly be construed as meaning "should remain either until such time as the compen-"sation or adjustment under the Act of 1946 has been paid "or until the time for applying under the Act has expired."

For those reasons, I am of opinion that the effect of these resolutions in 1950 and 1951 was to create special rights. If that view is correct, then, as Sir Andrew concedes, everything else follows, and the only course open to this court is to dismiss the petition. But we have heard full argument upon the other and more general matter, and, for reasons which I have already given, I think it right to express my view also upon the general question of fairness of the proposed scheme.

In approaching that matter, I have in mind again what was said in the two cases in the House of Lords to which I have earlier alluded, and to the somewhat nebulous character of the rights which this section has been apt to confer; and, in proceeding to consider this matter, I do so on the assumption, of course, that the terms of the two resolutions in 1950 and 1951 were, contrary to the view which I have expressed, not apt to create any special rights at all. I also accept the view, which found support in those same cases, and for which Sir Andrew contended, that the onus in this matter lies upon those who seek to establish that the scheme ought to be rejected as unfair.

One other matter must be stated, and stated in no uncertain terms, as a prelude to my judgment on this part of the case, and that is that no kind of imputation whatever is made in this case against the absolute good faith and impartiality of the directors. It does, indeed, so happen that the three directors (for there are but three) themselves hold small quantities only of the stocks of all three classes. It is therefore quite plain on the facts that the directors had no personal interest in the matter which would be in the least likely to conflict with their duty to do the best they could for their company and for the stockholders in it. For some reason, at which it is possible to hazard a guess but which is quite immaterial, it is, I think, clear that the view now taken by the board of the possible benefits which classes of stockholders generally, and preference stockholders in particular, might derive from the operation of section 25 and the regulations made thereunder has undergone a change. It is impossible to read the earlier circulars or the references in the chairman's speeches four and five years ago or even less and conclude otherwise than that the directors then thought there was some substance in the prospects tendered by section 25 of the Act of 1946.

I will make reference to the chairman's speech or observations in one or two of the early reports of the directors. In the report which accompanied the accounts for the year ended December 31, 1948, the then chairman, under the heading of "Coal Industry "Nationalization Act," stated the then present condition of affairs in regard to the award and distribution of the £164,000,000-odd which had been set apart for the former proprietors of the coal industry. He stated that the interim income which was payable under the terms of the Act "is the main and, in some "cases, the only source of revenue in many colliery under-"takings," and he expressed the doubts which he entertained for the prospects of the stockholders if that interim income ceased to be payable or did not amount to a large enough sum to discharge the various-income obligations on the company. "Your directors," he said, "feel that no adjustment scheme can be usefully con-"templated until the amount of compensation falling to the "company is known." That statement was made after a reference to section 25, in which he stated that provision is there made "for the adjustment of interests of different classes of debentures "and shares in attachment to distribution of final compensation." He was therefore making clear that his board's policy was to postpone consideration of any adjustment scheme until the compensation payable to the company had been paid in full. Again in the following year he drew attention to the same point. He referred to the compensation procedure and to its partial satisfaction, and said: "It is obvious that the reduced interim revenue "payments will not enable us to meet outgoings and maintain "present dividends on our present issued capital over the years "pending finality of compensation payments," and concluded by this: "I am impelled to warn stockholders that unless present "procedure re valuations is speeded up, we shall not, in my "opinion, reach finality before 1954, if then. This is an additional "and cogent reason for proceeding with our 'repayment of capital "'scheme.'"

In the light of that state of affairs, these schemes for repayment were put forward. It is, in my judgment, essential not to lose sight of the fact that this company was not proposing to continue in business at all. It is manifest that the directors were going, as occasion offered and the compensation was payable, gradually (in effect) to liquidate the company, but to await the receipt of final compensation before embarking on any adjustment scheme. It is in the light of that essential matter of fact, as I think, that one must interpret the true inference and effect of the statements in the earlier circulars of 1950 and 1951. The vital words—and I repeat them, though the whole passages in the circulars ought to be borne in mind—are: "It is your board's "intention that any rights stockholders may have under section "25 shall be retained until the amount of compensation payable "to the company is determined." That must also be read together with the forms of resolutions which accompanied the circulars, including the provisos, which, of course, on this view, did not operate to confer special rights, but did plainly operate to emphasize in no uncertain terms the statement that the board's intention was to keep alive the interests of the preference stockholders, at least to an extent sufficient to enable them to avail themselves of whatever rights, effective or otherwise, section 25 offered to them.

So I come to the proposals which led up to the passing of the resolutions for reduction, which are now before the court, reduction involving essentially the total extinction of the preference stockholders as classes and, therefore, as is conceded, complete elimination of any right they might have to make application under the section. It is, I think, not unimportant to bear in mind that, although the payment of final compensation has not occurred, still there is a right, as I read the regulations, for these classes of stockholders to initiate proceedings themselves at any time if the company on its part does not think fit to put forward what is called an adjustment scheme. Sir Andrew Clark frankly admits that the directors had suffered between 1951 and the spring of 1953 a change of heart or mind in this matter. The circular of April 24, 1953, is obviously framed to make clear the view of the directors that these rights of the preference stockholders, which the board had two or three years earlier been so careful to state their intention to preserve, were in fact of no value whatever. It is perhaps startling to find that the proposal to eliminate altogether both classes of preference stockholders was, in the light of what had gone before, regarded as not requiring a special meeting of either class or even as requiring or enabling the first preference stockholders to attend and vote at the general meeting; but, startling though it appears, that view is, of course, correct, unless it is postulated that the resolution did involve a modification or abrogation of special rights attached either to the first preference or the second preference stockholders.

[His Lordship read the circular of April 24, 1953, and continued:] The board, then, were expressing the hope that both classes of preference stockholders (though, as I have said, the first preference stockholders were not entitled to attend and vote at the meeting which was being summoned) would accept the advice tendered and would refrain from exercising the one right, which they had in the circumstances, of making themselves some application for an adjustment scheme or serving notice upon the company to that effect.

The question then is posed: in view of what the directors stated, is it shown to be unfair or inequitable—I state it thus because of the onus of proof—now to propose to these stockholders their own total extinction? I must say that I, for my part, have felt doubt about it, partly because of a fear that the view that there was here unfairness or inequitableness might be thought to reflect in some measure on the good faith of the directors. I have already said that no such reflection can possibly be made; but, after some vacillation in my own mind, I have come to the conclusion that this is a scheme which, in the circumstances, the court ought not, in its discretion, to sanction, and that it is not, according to the ordinary common sense of this matter, fair or equitable. I quite follow the force of Sir Andrew's argument that these earlier circulars did no more than state the present intention of the board and, if that is a fair reading of them and no more, that any sensible stockholder should say to himself: "Well, "that is what they think now, but there is no reason why they "should not change their mind and, indeed, they cannot bind "themselves and their successors not to change their mind." But my view is that, in the circumstances of the case, so clear and unequivocal an expression of the board's intention does and would reasonably be taken to mean something more than that.

I have said that these earlier reductions were but stages in the final liquidation and distribution of this company's assets, and where the board twice makes it plain that it is part of the board's policy to postpone any consideration of an adjustment scheme and to retain for the preference stockholders these rights, whatever they might be, and where on both the first two occasions the two classes of stockholders were invited to support the reductions on that footing expressly—and I pause to note that the first preference stockholders particularly were asked to accept that statement of policy as the justification for a departure from strict rights—when all that is done, I think that there is here such a representation of policy on the part of the board that it is not fair or equitable now to tell these same persons: "Well, we have "changed our minds and that which was held out to you as "the chief inducement to assent before is now to be taken away "altogether." It seems to me that the matter is one to be judged by ordinary common sense. It is not to be forgotten that the ordinary shareholders did get an advantage as a result of these earlier reductions. As the chairman had rightly pointed out, as things then stood, the income available was not going to be, or not likely to be, sufficient to maintain existing dividends, if all the capital remained outstanding. Therefore, there was to be that

C. A.
1953

OLD SILKSTONE COLLIERIES LD., *In re.*

Evershed M.R.

reduction and a consequent relief of the charges against income for the benefit of the ordinary stockholders.

Mr. Strangman referred us to the well-known passage of Bowen L.J. in *Birmingham and District Land Co.* v. *London and North Western Railway Co.*[4] The language which he there used was: "The truth is that the proposition is wider than cases of "forfeiture. It seems to me to amount to this, that if persons "who have contractual rights against others induce by their "conduct those against whom they have such rights to believe "that such rights will either not be enforced or will be kept in "suspense or abeyance for some particular time, those persons "will not be allowed by a Court of Equity to enforce the rights "until such time has elapsed, without at all events placing the "parties in the same position as they were before. That is the "principle to be applied. I will not say it is not a principle that "was recognised by Courts of Law as well as of equity." That passage was cited and approved by MacKinnon L.J. in a characteristic judgment in *Marquess of Salisbury* v. *Gilmore*,[5] where he observed the distinction validly to be drawn between the *Birmingham and District Land Co.* case[6] on the one hand and the celebrated case of *Jorden* v. *Money*[7] on the other. The rights of the different classes of stockholders in a company are contractual rights derived from the company's articles of association. But I need not go so far as to say that this case necessarily falls within the exact terms of Bowen L.J.'s language. That language seems to me sufficient, at any rate, to justify the view that, looking at this matter from a common sense man-of-the-world point of view (if I may use those phrases), it is inequitable, after so much had been said and such promises had been given —such statements of policy on the part of the board—for the board now to turn round and reverse all that had gone before.

It is always the function of the court to look with care at (as it is said, to scrutinize closely) schemes of this character or, at any rate, complicated schemes. No one would call this case complicated, and therefore all that fell from Maugham J. in *In re Dorman, Long & Co. Ld.*[8] is not necessarily applicable to a simple and straightforward case like this. I have in mind the criticisms which Maugham J. then made of a statement in a circular before the court to the effect that the trustees of certain debenture stockholders had approved the scheme and recommended its acceptance. It turned out that the trustees were a bank which had a very strong interest in another capacity, seeing that they were at the time owed as bankers approximately £1,500,000.

---

[4] (1888) 40 Ch.D. 268, 286.

[5] [1942] 2 K.B. 38, 51; [1942] 1 All E.R. 457

[6] 40 Ch.D. 268.

[7] (1854) 5 H.L.C. 185.

[8] [1934] Ch. 635, 657.

Our attention in this case has been drawn forcibly by Mr. Strangman to the passage in the last circular, "These proposals "have been submitted to," etc. So far as the facts are concerned, it appears that there were three stockholders of this company who were members of the first-named association, namely, the Association of Investment Trusts. Of those three, one of them, Electrical and Industrial Investment Co. Ld., held not large amounts of each stock, approximately the same amount. The other two, according to the evidence, never in fact had any recommendation made to them or heard anything about it from the association, and one of them is in fact an objector to the scheme. There were also three members of the British Insurance Association, one of whom held exclusively ordinary stock, and another, Royal Exchange Assurance, held such small amounts of each stock that they obviously had little or no substantial interest in the matter. That left one holder—true, of over £1,000—of first preference stock.

We have been told that the reason why the three members of the first association did not in fact receive any recommendation from their association was that, unhappily, the association had not available a register showing the relative holdings which was sufficiently up to date; but, as is pointed out, whether or not individual members of the association were in fact informed, matters perhaps not so much. The effect, the meaning, the sting, as it has been said, of this sentence is obvious. The persons to whom it was addressed, particularly the two classes of preference stockholders who were asked to accept the proposed repayment, plainly were being told: "It is really no good your "pinning any hopes on your rights, if any, under section 25 of "the Act of 1946. As you see, these very important bodies are "of opinion that there is nothing to be got out of it, and they "will give you no support at all." I should have thought it obvious that any stockholder reading that sentence, who had been a little inclined to stand up for his own rights, would (to say the least) be very greatly discouraged. But his discouragement, I should have thought, would have been very much mitigated had he known the very slight interest which the members of these high-sounding bodies really had in this company. I think, therefore, that a statement of this kind, without any further explanation of the extent and character of the interests which are involved,

C. A.
1953

OLD SILKSTONE COLLIERIES LD., *In re.*

Evershed M.R.

does have so important an effect upon the mind of the ordinary individual holder that the use of such argument in a circular is undesirable, prima facie, without sufficient explanation to give it its true significance.

In saying that, I gather from Mr. Strangman that I am repeating what I myself said as a judge of first instance in *Selfridge's (Holdings) Ld.*,[9] when my observations were approved in this court. It is again only just to the directors to state that the form of words which they used was settled for them by the representatives of these two bodies, who are in the happy position of being able to suggest forms of words for which afterwards they bear no responsibility whatever. But I do not think, in the circumstances, that anything really is added by this circumstance. However much one might regret the insertion of this kind of statement, it seems to me that the real question of fairness or unfairness falls to be determined by reference to what had gone before, though I do not minimize this point, that had it not been for that statement, an individual might have had sufficient confidence in his rights under the section to have made then and there some application, or served a notice upon the company that he wished to make application, under section 25.

For the reasons which I have stated, my view (which I believe to have been the view which Vaisey J. was himself inclined to entertain) is that, if I am wrong on the first point, then I think that this is a case in which the court, in its discretion, should not have confirmed this proposed reduction; but it is sufficient, having regard to the view which I take on the first point, to say that, the resolutions not having been properly passed, the proper course for this court is to refuse the petition and to allow this appeal.

JENKINS L.J. I agree. The first question is whether the special resolution purporting to have been passed on May 19, 1953, for the reduction of the capital of the company by returning the whole of the capital paid up on the first preference and second participating preference stocks, and cancelling those two classes of stock, was validly passed.

The articles of association of the company contain in article 6 the following provision in regard to modification of rights: "If at any time the capital of the company is divided into "different classes of shares, the special rights attached to any

---

[9] Unreported, No. 00320 of 1945.

"class may either with the consent in writing of the holders "of three-fourths of the issued shares of the class, or with the "sanction of an extraordinary resolution passed at a separate "general meeting of such holders (but not otherwise) be modified "or abrogated. . . ." Article 65 contains provisions as to voting to which I need not refer except to note that they include this proviso: "Provided that the first preference stock and shares "shall not entitle the holders to receive notice of or attend or "vote at any general meeting unless either (a)"—then there is provision for the case of the preference dividend being in arrear, which does not arise in this case—" or (b) the business of the "meeting includes the consideration of a resolution directly and "prejudicially affecting the special rights attached to the first "preference stock or shares."

To the meeting of May 19, 1953, there were summoned only the holders of second preference stock and the holders of ordinary stock, the view taken by those responsible for convening the meeting being to the effect that the resolutions proposed to be passed did not involve any modification of rights within article 6, and further did not involve any prejudicial effect on the special rights of the first preference stock under article 65, so that it was neither necessary to summon the holders of the first preference stock to the meeting nor to hold separate meetings of the two classes of preference stock. Apart from the two special resolutions by which the two earlier reductions of capital were effected, it is not suggested that there was any special right of either class of preference stock which would be in any way affected by the proposed resolutions. These two classes rank immediately after each other for repayment of capital in a winding-up, with no right to participate in surplus assets, and accordingly (apart from those two special resolutions) a reduction which provided for paying off the whole of the capital paid up on the first preference stock and the second participating preference stock in that order would have been a reduction in accordance with strict legal rights.

But it is claimed that the two resolutions, by which the two previous reductions of capital were effected, did attach special rights to each of these two classes of preference stock, and that those rights were modified or abrogated or prejudicially affected by the third resolution for reduction, inasmuch as it had the effect of extinguishing them altogether, thereby putting an end to the special rights said to have been created by these two special resolutions.

C. A.
1953

Old Silkstone Collieries Ld., *In re.*

Jenkins L.J.

The provision relied on for that purpose in the first special resolution for reduction (No. 1 of August 22, 1950) follows the provisions dealing with the reduction of the two classes of preference stock by paying back to the holders of each class half of the capital then paid up thereon, and is in these terms: " but so " that notwithstanding such reduction of capital the holders of " the said first preference stock, second participating preference " stock and ordinary stock shall respectively remain entitled to " claim the same adjustment of their interest as could have been " claimed under section 25 of the Coal Industry Nationalization " Act, 1946, if the said reduction of capital had not taken effect." A corresponding provision in almost exactly the same terms appears in the second special resolution for reduction (No. 2 of October 16, 1951) with this difference, that whereas the proviso in the earlier resolution had included a reference to the ordinary stock, the proviso in the later one refers only to " the said first " preference stock and second participating preference stock."

The question, therefore, is whether the provisions to which I have referred, and in particular the provision occurring in the second of the two special resolutions—the resolution of October 16, 1951—confer special rights on the holders of the first preference stock and second participating preference stock respectively. In my opinion the provisions in question do have that effect. They declare that the holders of these classes of stock shall respectively remain " entitled to claim the same adjustment of their interest " as could have been claimed under section 25 of the Coal Industry " Nationalization Act, 1946, if the said reduction of capital had " not taken effect." To my mind the words " shall respectively " remain entitled " are clearly words apt to confer a right, and in my view that which is conferred by those governing words is plainly capable of subsisting as a right. Moreover, I think that the right is conferred as regards each class as a right peculiar to that class of stock, and is, therefore, a special right within the meaning of the articles.

Sir Andrew Clark, for the company, maintained, first of all, that the provisions in question did not confer any right at all, inasmuch as any adjustment must be effected on the footing of the paid up capital as it existed on January 1, 1947, the vesting date under the Act. I cannot accept that proposition. It seems to me, with all respect to Sir Andrew's argument, quite plain that in any adjustment proceedings, the expectations of the different classes of stock must be measured according to their amounts as then existing.

Next it is argued that in any case the provisions in question are only declaratory of an existing statutory right which is common to all classes of stockholders, and subsists not by virtue of the articles or any special resolution, but by virtue of section 25 of the Act. Again I cannot accept that argument. In the first place, in my view these provisions give contractual effect as between the members to a right which formerly existed purely as a statutory right. Furthermore, it seems to me that, again by way of contract between the members, they confer by reference to section 25 of the Act a right which could not exist by the unaided operation of the section itself. In my opinion, a preference stockholder before the passing of the first of these resolutions could accurately have said: "I am entitled, or will in due "course be entitled, to claim an adjustment under section 25 "of the Coal Industry Nationalization Act, 1946, by virtue of the "provisions of that Act." It appears to me that in order to be accurate in stating his position after the special resolution had been passed, he would have had to say: "By virtue of the "special resolution passed on" such and such a date "I am "entitled to make the same claim under the provisions of section "25 of the Act as I could have made if the reduction effected "on" such and such a date "had not been effected." In other words, it is not an accurate description of his position, after the passing of the resolution, to say that he has no more than the ordinary statutory right.

Accordingly, I am of opinion, as regards the first question, that on the true construction of the two reduction resolutions of 1950 and 1951, a special right of the nature I have endeavoured to describe was attached to these two classes of preference stock. It follows that such special right was modified or abrogated—clearly the more appropriate word would be the latter—by the third reduction resolution, which purported to extinguish those classes of stock by paying back the whole of the capital paid up thereon, and furthermore, that such reduction did directly and prejudicially affect a special right attached to the first preference stock. In order, therefore, validly to carry out this reduction, it was necessary to hold a general meeting to which would be summoned not only the holders of the ordinary stock and second participating preference stock, but also the holders of the first preference stock; and, in addition, it was necessary to put the proposals to separate meetings of the holders of those two classes of stock in accordance with article 6, and procure the respective approval of those two classes of stockholders to the proposals by the requisite majority.

As my Lord has said, the result of that view on the first question is that the second question strictly does not arise; but I will follow his example and add very briefly some observations of my own on the question whether, on the footing that the disputed resolution for reduction was validly passed, the case is nevertheless one of those in which the court, in the exercise of its discretion, should decline to confirm the reduction on the ground that, in all the circumstances of the case, it operates unfairly to the objectors.

It is to be observed that from at least the year 1948 down to the time when the scheme for the final repayment of the whole of the capital remaining paid up on the two classes of preference stock was mooted, the declared policy of the directors of this company has been consistently to the effect that they would defer consideration of any adjustment scheme under section 25 of the Act until all questions of compensation had been finally cleared up. My Lord did refer to the passage in the chairman's statement, accompanying the accounts for the year ended December 31, 1948, in which he said: " Under section 25 of the Coal Industry " Nationalization Act, 1946, and the regulations attached thereto, " provision is made for the adjustment of interests of different " classes of debentures and shares in attachment to distribution " of final compensation. Your directors feel that no adjustment " scheme can be usefully contemplated until the amount of compensation falling to the company is known."

Consistently with that policy, the first of the three reductions was so arranged that any rights there might be to adjustment under section 25 should not be disturbed. If I may be excused for reading again the most relevant passages from the circular of July 28, 1950, issued in connexion with the reduction of August 22 of that year, in that circular the chairman said: " Section 25 of " the Coal Industry Nationalization Act, 1946, provides for the " adjustments of rights as between the holders of preference and " ordinary stocks. It is your board's intention that any rights " stockholders may have under section 25 shall be retained until " the amount of compensation payable to the company is determined. Whilst the proposal to repay 10s. per £1 of stock to " both classes of preference stockholders is not strictly in accord " with the rights of first preference stockholders under the company's articles of association, in that they are entitled to prior " repayment of capital, your board draw attention to the fact "that if the whole of the first preference stock was repaid these "stockholders would be deprived of any rights which they may "have under section 25 as the stock would cease to exist." Then in a later paragraph: "Your directors consider that it is in the "interests of all classes of stockholders to make the repayment "of capital now proposed and recommend the scheme submitted "for your consideration and acceptance. Enclosed please find "notices calling the various class meetings together with the "resolutions to be submitted. These preserve the rights (if any) "of preference stockholders under section 25, cover the necessary "alterations in the company's articles of association regarding "capital, preserve the existing balance of voting between classes "of shares," and so on.

It appears to me that this circular, particularly the passages from it which I have read, taken in conjunction with the proviso to the first of the special resolutions of which notice was enclosed, could not fail to convey to any preference stockholder reading it that he was being asked by the directors of the company to suffer a reduction by way of repayment of capital of 10s. in the £ of his holding of stock on the understanding that he would remain entitled to claim in due course in adjustment proceedings the same adjustment as he could have claimed if there had been no such reduction. Sir Andrew Clark said that no such effect can fairly be attributed to the circular, because the contemplated retention of any rights of stockholders under section 25 of the Act, until the amount of compensation payable to the company was determined, was described as a matter of the board's intention— "It is your board's intention that," and so forth. Sir Andrew argued that an intention is an intention, and nothing more, and that a man may genuinely intend one thing one day and another the next, and that the directors and the company and the ordinary stockholders were not to be handicapped by a mere expression of what may have been the intention of the board at that particular time.

For my part, I cannot give the use of the word "intention" in this context the qualifying effect suggested by Sir Andrew. In my view, that passage in the circular might, without changing the meaning, have been expressed in these words: "Your board "has decided that any rights which stockholders may have," and so on. Of course the board, having decided one thing one day, might be able to decide something else the next; but it does not follow that they could alter their decision, or alter their intention (if that word is used) after the decision or intention once expressed had been acted upon.

The circular which accompanied the notice of meeting and the form of special resolution for the second of the three reductions contains passages to a similar effect; and in my judgment the effect of that circular, read as a whole, again was, in effect, to ask the preference stockholders to submit to a further reduction of their holdings by a repayment of 50 per cent. of the then remaining paid up capital on the understanding that they were to remain entitled to claim in due course in adjustment proceedings on the basis of the amount of their respective holdings as they stood before the first reduction. The representations in those circulars having been acted on by the two classes of preference stockholders in submitting to the reductions effected in accordance with the two earlier schemes, it was, in my view, impossible, consistently with good faith, for the company then to propose a further reduction, which would bring about the total extinction of the capital paid up on the preference stock, and by such extinction destroy the right to claim adjustment under section 25 which had been so jealously preserved down to that point, and which had been, I think, an essential element in all previous proposals. When I say "consistently with good faith," I am not intending to use that expression in any sense which would cast any reflection on the probity of the directors. The directors of this company, I have no doubt, are doing their best in the interests of all the stockholders; they have themselves no particular axe to grind, having only insignificant holdings of stock of the various classes. But it does seem to me, though no doubt the directors acted with the best intention throughout this matter, that the third reduction of capital, resolved upon by the special resolution of May 19, 1953, would, if given effect to in accordance with its terms, amount to something which I can only describe as a breach of faith.

Furthermore, in my judgment, the circular of April 24, 1953, is open to some criticism in the respects which my Lord has indicated. In effect, it tells the holders of the first preference stock and second participating preference stock that, after all, the rights of adjustment of which so much had been heard in the past were entirely valueless. It tells them further that "the "use of an adjustment scheme would only invoke long delay "and expense, and in view of the foregoing it is hoped that the "preference stockholders will accept the proposed repayment "terms." It tells holders of first preference stock that they are being informed "as a matter of courtesy and for information "only," and that "they are not entitled to attend or vote at "the extraordinary general meeting." It further states: "These "proposals have been submitted to and discussed with the "Association of Investment Trusts and the British Insurance "Association Investment Protection Committee who are recom-"mending their interested members to vote in favour of the "resolutions to be proposed at the extraordinary general meeting "and to take no part in promoting or supporting any proposal "for an adjustment scheme." It appears to me that this circular, taken as a whole, is telling these two classes of preference stockholders that their rights in respect of adjustment are, after all, valueless; that there is nothing that they can do about it; that it is no use their proposing or supporting any proposal for adjustment; and that, in effect, they have no alternative but to accept the scheme.

The second participating preference stockholders were entitled to vote, although their vote could not on any view have been effective. The first preference stockholders did not even have the satisfaction of being able to cast an ineffective vote. In my view, this last circular and the present reduction resolution do, considered in the light of what had previously passed, involve a volte face of which these two classes of stockholders can legitimately complain as amounting to a breach of faith; and I also think that, unwittingly no doubt, the circular of April 24, 1953, was couched in language calculated to stifle any question or criticism on the part of the two classes of preference stockholders.

Sir Andrew Clark has contended that the result at which we have arrived bears hardly on the ordinary stockholders, for, he says, it means that they will be saddled, until nobody knows when, with two classes of high dividend preference stocks, whose dividends are not in fact now being fully earned. I am not satisfied that the position is so difficult as Sir Andrew would have us believe, for I see no reason myself why it should not be perfectly possible, while avoiding the disadvantage of paying high preferential dividends on substantial quantities of stock, to preserve the rights of those stockholders by the simple expedient of a scheme of reduction under which the capital paid up on their holdings would be reduced to a purely nominal sum, with a proviso preserving their rights in regard to adjustment as if none of the reductions so far made had been made, thus carrying out to its logical conclusion the policy which was followed on the first two occasions.

I will not take up more time in discussing the matter further, but will content myself by saying that, for the reasons which my Lord has given, and those which I have endeavoured to add myself, I agree that this appeal should be allowed.

MORRIS L.J. I agree. In his speech in *Scottish Insurance Corporation Ld.* v. *Wilsons & Clyde Coal Co. Ld.*[10] Lord Simonds said that, important though the task is to see that the procedure by which a reduction is carried through is formally correct, the court has the further duty of satisfying itself that the scheme is fair and equitable between the different classes of shareholders. He went on to say that what is fair and equitable must depend upon the circumstances of each case. It is conceded here that the procedure of the reduction was not formally correct if there were special rights attached to the preference stockholders. Class meetings were not held to comply with article 6, and the first preference stockholders were not invited to attend the extraordinary general meeting of May 19, 1953. I am clearly of the opinion that the provisos to the special resolutions passed on August 22, 1950, and October 16, 1951, did give to the preference stockholders special rights. I am in full agreement with, and do not repeat, the reasons which my Lords have expressed in support of that view. But, further, while no reflection upon the good faith of anyone is implied, it seems to me that it would not be fair and equitable to sanction the proposed reduction, having regard to the terms of the two circulars of July 28, 1950, and September 21, 1951. In my view, they contained a clear invitation to all concerned to act on the basis that a right to take action under section 25 of the Coal Industry Nationalization Act was being, and would be, preserved. It does not seem to me that it comes very happily from the company or from the ordinary stockholders at a later time to say that there had merely been an empty and valueless reservation; nor, indeed, to seek to put the preference stockholders to proof that section 25 could fruitfully be invoked.

We were referred by Sir Andrew Clark to a passage from the speech of Lord Maugham in the *Wilsons & Clyde* case,[11] where he said: " On the other hand, I think those who oppose the " reduction by founding their argument on the provisions of

---

[10] [1949] A.C. 462, 486.

[11] Ibid. 482.

"section 25 are bound to indicate how the section or the regulations which have recently been made thereunder, on any "reasonable view of probability, can operate in this case to "give the preference shareholders any rights to share in the "assets beyond those they now possess under the articles of "association." It seems to me that the position in the present case differs from the position in the *Wilsons & Clyde Coal* case.[11] Here the preference stockholders are opposing the reduction by saying that all concerned were invited to act and to proceed on the basis that the company would not reduce by repaying the whole of the preference stockholders until the value, if any, of the claim under section 25 could be ascertained.

We were further referred by Sir Andrew Clark to what was said by Lord Simonds in his speech in *Prudential Assurance Co. Ld.* v. *Chatterley-Whitfield Collieries Ld.*[12] Lord Simonds said, in reference to that case: "It is therefore, to put it at the lowest, "so unlikely that the preference shareholders can get anything "more than the full amount of their capital returned to them, "that the court should not depart from its well-known and familiar "practice in dealing with a petition to confirm a reduction of "capital." In the last of the three circulars, the circular of April 24, 1953, there is set out the experience over the period of 10 years before the vesting date of the first and second preference stockholders and of the ordinary stockholders. The figures having been set out, referable to the years and to the classes of members, the circular proceeded: "Your directors and their professional "advisers are therefore of the definite opinion that no monetary "value can be attached to the first preference stock and second "participating preference stock as to any right which may exist "under section 25 (1) of the Coal Industry Nationalization Act, "1946." I can neither form nor express any sort of opinion with regard to a claim under section 25, but it seems to me that the recital of the figures set out in the circular does not inevitably, as is rather suggested by the word "therefore," rule out all the prospects of any claim for adjustment that might be made.

Appeal allowed; no order on the cross-appeal.

Solicitors: *Hardman, Phillips & Mann; Clifford-Turner & Co. for Hepworth & Chadwick, Leeds.*

B. A. B.

---

[11] [1949] A.C. 462.

[12] [1949] A.C. 512, 520.

1953
Dec. 4.

Upjohn J.

In re REES, DECD.
LLOYDS BANK LD. *v.* REES AND OTHERS.

[1953 R. 2619.]

Trust and Trustee—Protective trust—Express—Advancement—No express advancement clause—Whether statutory power of advancement—Whether forfeiture incurred by consent to exercise such power—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *ss.* 32, 33, 69.

A testator, by his will dated November 6, 1935, devised and bequeathed the residue of his real and personal estate to his trustees on trust for sale and conversion, and to pay the income thereof to his three grandchildren, and after their respective deaths to pay the capital of the fund to their respective children who should survive them. The interests of the grandchildren were settled on protective trusts, but the draftsman did not utilize or refer to the provisions of section 33 of the Trustee Act, 1925. The will contained no express advancement clause.

On the questions whether the trustees were empowered to make advances to those contingently interested in capital, by virtue of the terms of the will and the provisions of the Trustee Act, 1925, and, if so, whether a life tenant (any one of the grandchildren) by consenting would forfeit his or her life interest:—

Held (1) that the powers of advancement conferred by section 32 of the Trustee Act, 1925, must be read into the will, for, in the absence of a clear contrary intention within section 69 of the Act, it must be presumed in a will made after 1925, which does not contain an express advancement clause, that the draftsman intended to rely on the statutory power of advancement; (2) that a life tenant by consenting to an advance did not forfeit his or her interest. ✓

In re Hodgson [1913] 1 Ch. 34, and *In re Shaw's Settlement* [1951] Ch. 833; [1951] 1 T.L.R. 470; [1951] 1 All E.R. 656 followed.

In re Stimpson's Trusts [1931] 2 Ch. 77 doubted and distinguished.

ADJOURNED SUMMONS.

The testator, Robert Price Rees, who died on November 27, 1935, devised and bequeathed by clause 16 of his will dated November 6, 1935, the residue of his real and personal estate wheresoever situate [the "residuary trust estate"] to his trustees upon trust for sale and conversion "with full power to postpone "such sale and conversion for such period as they (without being "liable for any loss arising thereby) may think fit and after pay-"ment of my funeral and testamentary expenses and debts and

---

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

" the legacies bequeathed by this my will or any codicil thereto " and subject to the payments aforesaid and to the provisoes " hereinafter contained my trustees shall stand possessed of the " income arising from such sale and conversion and from my " ready money and residuary estate to divide and pay the income " thereof to my three grandchildren namely Robert Wilfred Price " Rees, Joan Cecilia Mary Rees and Kenneth Alfred Seymour " Rees during their respective lives and after their respective " deaths to divide my estate or the proceeds of sale thereof (as " the case may be) equally among or between such children (if " any) of my respective grandchildren per stirpes as shall survive " them provided that if any person to whom any annuity or life " interest is hereinbefore given shall either be at my death or " thereafter become of unsound mind and be legally certified as " such or shall become bankrupt or assign or charge his or her " annuity or life interest or any part thereof or do or suffer any-" thing whereby the said annuity or life interest or any part thereof " would become payable to or vested in any other person then " and in any such case the annuity or income given to such person " shall cease And after the cesser of any such annuity or life " interest in the lifetime of the annuitant my trustees may at " their absolute discretion without being liable to account for the " exercise of such discretion in every or any year during the life " of the annuitant apply any sums not exceeding in any one year " the amount of the annuity or life interest hereinbefore given to " him or her for the maintenance support or otherwise for the " benefit of the annuitant and his or her wife or husband and " issue (if any) or any one or more of them exclusively of the other " or others in such manner as my trustees shall without being " liable to account think fit."

The trustees of the will took out the present summons for determination of the questions: (1) whether on the true construction of the will and by virtue of section 32 of the Trustee Act, 1925,[1] the trustees were entitled, subject to the consents made

---

[1] Trustee Act, 1925, s. 32: " (1) " Trustees may at any time or times " pay or apply any capital money sub-" ject to a trust, for the advancement " or benefit, in such manner as they " may, in their absolute discretion, " think fit, of any person entitled to " the capital of the trust property or of " any share thereof, whether absolutely " or contingently on his attaining any " specified age or on the occurrence of " any other event, or subject to a gift " over on his death under any specified " age or on the occurrence of any other " event, and whether in possession " or in remainder or reversion: . . . " Provided that . . . (*c*) no such pay-" ment or application shall be made so " as to prejudice any person entitled " to any prior life or other interest, " whether vested or contingent, in the " money paid or applied unless such

1953

REES, DECD.,
In re.
LLOYDS
BANK LD.
v.
REES.

requisite by section 32, to exercise in relation to the contingent share of any great-grandchild of the testator in his residuary estate under clause 16 of the will the powers of advancement conferred by the section; (2) whether upon the true construction of the will any of the testator's grandchildren giving his or her consent to an advance under the powers conferred by section 32 would forfeit his or her determinable life interest in the testator's residuary estate.

John Wood for the testator's grandchildren, their spouses and the persons beneficially interested in the event of an intestacy. On the first question, it is submitted that since the will is silent as to powers of advancement the provisions of section 32 of the Trustee Act, 1925, must be read into it. The will was made after 1925 and, accordingly, the testator or his draftsman must be presumed to have intended the statutory powers to be applicable in the absence of a clear contrary intention within section 69 of the Act.

On the second question, it is submitted that a life tenant does not forfeit his or her interest by consenting to an exercise by the trustees of the statutory power of advancement. *In re Hodgson* [2] and *In re Shaw's Settlement* [3] should be followed in preference to *In re Stimpson's Trusts*,[4] and the principle of *In re Shaw's Settlement* [3] extended to cover the case where the power given by section 32 is properly exercisable. *In re Stimpson's Trusts* [4] cannot be regarded as a satisfactory decision on the present question; it is not adequately reported on the question of forfeiture: see the observations of Harman J. in *In re Shaw's Settlement*.[5] In any event, *In re Stimpson's Trusts* [6] is plainly distinguishable from the present case on the facts, for both the settlement and will were made before the passing of the property legislation of 1925. [Reference was also made to *In re Mair*.[7]]

"person is in existence and of full "age and consents in writing to such "payment or application. (2) This "section applies only where the trust "property consists of money or securities or of property held upon trust for "sale calling in and conversion. . . . "(3) This section does not apply to "trusts constituted or created before "the commencement of this Act."

S. 69: "(1) This Act, except where "otherwise expressly provided, applies "to trusts . . . constituted or created "either before or after the commencement of this Act. (2) The powers "conferred by this Act on trustees are "in addition to the powers conferred "by the instrument, if any, creating "the trust, but those powers, unless "otherwise stated, apply if and so far "only as a contrary intention is not "expressed in the instrument, if any, "creating the trust, and have effect "subject to the terms of that instrument."

[2] [1913] 1 Ch. 34.

[3] [1951] Ch. 833.

[4] [1931] 2 Ch. 77.

[5] [1951] Ch. 833.

[6] [1931] 2 Ch. 77.

[7] [1935] Ch. 562.

1953

REES, DECD.,
In re.
LLOYDS
BANK LD.
v.
REES.

R. Gwyn Rees for great-grandchildren of the testator, all of whom were infants. As regards the first question, section 32 applies to this will because the section confers statutory powers on the trustees without any qualification save that stated in section 69 of the Act. It would be wrong to infer that because the will contains a forfeiture clause section 32 is thereby excluded on the ground that a clause of that nature amounts to a " contrary " intention " within section 69. *In re Garrett*[8] destroys the argument that section 32 cannot apply because the will contains a forfeiture clause: see *per* Clauson J.[9]

On the second question the argument on behalf of the testator's grandchildren is adopted. [Reference was also made to *In re Hodgson*.[10]]

J. A. Armstrong, for the trustees, argued on behalf of unborn children. On the first question, it is to be observed that the will in *In re Stimpson's Trusts*[11] was made in 1906 and, therefore, in view of the date of the will, section 69 of the Act of 1925 could have no bearing on the question before the court, since there could be no express or implied exclusion of section 32. The court is free on the authorities to hold that the insertion of the forfeiture clause in this will excludes the operation of section 32 during the subsistence of the life interests. But it must be conceded that Clauson J. in *In re Garrett*[12] took the opposite view in respect of a restraint on anticipation to which a protective life interest is analogous. Accordingly, the main submission for the view that section 32 is excluded by virtue of a " contrary intention " within section 69 is based on the terms of clause 16 itself. The language of the clause excludes the operation of section 32, for under the trust arising after the cesser of a life interest the trustees have an absolute discretion as to the application in any one year of " the amount " of the annuity. This would seem to indicate that the draftsman envisaged that the amount of the life interest would continue unabated during the residue of the life of the beneficiary who had forfeited his life interest. But, plainly, any application of capital moneys under section 32 would ipso facto reduce " the amount " of the life interest. This, it is submitted, amounts to a contrary intention which would exclude section 32: see *In re Turner's Will Trusts*.[13]

On the second question, it is conceded that the point is unarguable in view of the observations of Farwell J. in *In re Mair.*[14]

---

[8] [1934] Ch. 477.

[9] Ibid. 482.

[10] [1913] 1 Ch. 34.

[11] [1931] 2 Ch. 77.

[12] [1934] Ch. 477.

[13] [1937] Ch. 15.

UPJOHN J. The first question which I have to determine is whether the statutory power of advancement under section 32 of the Trustee Act, 1925, in favour of persons contingently entitled to the capital of residue under the will of Robert Price Rees is applicable to that will or not. The will, dated November 6, 1935, disposed of residue by clause 16. The testator gave the residue of his estate on trust for sale to pay his debts, and so forth, and on trust to divide and pay the income thereof to his three grandchildren during their respective lives, and after their respective deaths he gave the estate over to their respective children who should survive them.

The testator then provided that the life interests should be held upon protective trusts. The will did not incorporate section 33 of the Trustee Act, 1925, but expressed them in these terms: [His Lordship read the relevant provisions of clause 16 of the will and continued:] I need not read section 32 of the Trustee Act, 1925. It is sufficient to say that subsections (2) and (3) are satisfied, for the trusts declared concerning residue were upon trust for sale, and the will, of course, came into operation long after the Trustee Act, 1925. Section 32, therefore, applies unless a contrary intention is expressed in the will: see section 69 (2) of the Act.

It was submitted by the trustees, who have very rightly and properly argued this point before me as representing unborn children, that the form of the protective life interest and the discretionary trust that arises thereunder upon forfeiture shows a contrary intention within the meaning of section 69. It was argued that the trust after the cesser of the life interest, whereby the trustees have an absolute discretion as to the application in any one year of the amount of the annuity or life interest, indicates that the amount of the life interest would continue during the residue of life of the particular life tenant without diminution because of the reference to the words "the amount," and that, therefore, there was a contrary intention which would exclude section 32 because any application of moneys under that section would reduce "the amount" of the life interest.

I was referred to *In re Turner's Will Trusts,*[1] where it was held that a direction to accumulate negatives the power, under section 31 (1) of the Act, to pay income to a person contingently entitled who had attained the age of 21; but the question is one of construction of each will, and I do not find sufficient in the discretionary trusts to amount to a contrary intention within the meaning of section 69. In my judgment the proper view to take is this. This will is silent as to powers of advancement, and I must, therefore, assume that the draftsman had in mind the power conferred upon trustees by section 32; and to exclude that very beneficial power there must be expressed or necessarily implied from the context a clear contrary intention; in my judgment, the language of clause 16 does not amount to such a clear contrary intention as to exclude in any way the very beneficial power which is almost invariably to be found in settlements either expressly or in reliance on the statute enabling trustees to make advancements.

---

[14] [1935] Ch. 562, 566.

[1] [1937] Ch. 15; 52 T.L.R. 713; [1936] 2 All E.R. 1435.

Accordingly, section 32 of the Trustee Act, 1925, applies, and, being applicable to this will, it must be read into the will: see *In re Garrett.*[2] That was a decision concerning a restraint upon anticipation, but Clauson J. said: " As has been pointed out, " the powers given by the section have effect subject to the terms " of the instrument creating the trust: see section 69 (2) of the " Trustee Act, 1925; and one of the terms of the will is that " Mrs. Croft shall not anticipate the income of the share in " question. But, in my judgment, Mrs. Croft has, notwithstand- " ing the restraint, power to give her consent to the exercise by " the trustees of their power of advancement under the section. " That power must be taken to be incorporated in and read as " part of the will and Mrs. Croft's power of consenting is not, in " my view, inconsistent with the restraint against anticipation " imposed by the will. Further, it is to be observed that in this " will there is no forfeiture clause, the presence of which might " well make a difference and introduce matter for consideration." I think that that last sentence was merely directed to this, that the judge was expressing a doubt whether a consent where there was a forfeiture clause operated to forfeit the primary life interest and remained a matter for consideration. That is a question which I shall have to consider later. It seems to me, therefore, that section 32 must be read into the will, and if, pursuant to the power, money is raised, the provisions of the will merely operate on what remains in settlement from time to time; raising the money does not per se create a forfeiture. The trustees will apply the amount of the annuity or life interest that from time to time remains in the settlement: see *In re Mair*,[3] in which Farwell J. took that view.

---

[2] [1934] Ch. 477, 482.

The next question I have to determine is whether, if the trustees exercise the powers conferred upon them by section 32, a life tenant, who by the terms of that section has to give his consent to any advancement, thereby forfeits his life interest and brings into existence the discretionary trust. That matter is not free from authority. It may, I think, be conceded that, on reading the words of the forfeiture clause literally, a "consent" under the section is to "do or suffer anything "whereby the annuity or life interest or any part thereof would "become payable to or vested in any other person." That, however, is not conclusive of the matter, for Neville J. in *In re Hodgson*,[4] said that the forfeiture clause "should be read as "though there had been inserted at the end of the forfeiture "clause 'But this provision is not to affect any steps taken by "'the husband to enable the advances by the trustees herein"'after provided for to take effect.'" That case, of course, was concerned with an express power of advancement, for in 1913 there was no Act with a section corresponding to section 32 of the Act of 1925.

In re Hodgson[4] was recently followed by Harman J. in *In re Shaw's Settlement*.[5] He had there to consider a decision of Luxmoore J. in *In re Stimpson's Trusts*,[6] in which Luxmoore J. came to a conclusion contrary to that of Neville J. in *In re Hodgson*,[7] and held that giving consent to a power of advancement under section 32 did operate to work a forfeiture. For the reasons, however, which Harman J. stated in *In re Shaw's Settlement*,[8] *In re Stimpson's Trusts*[9] cannot be regarded as a satisfactory decision, and Harman J. felt himself at liberty to follow the decision of Neville J. in *In re Hodgson*[10] in preference to that of Luxmoore J. in *In re Stimpson's Trusts*.[11] But Harman J. was dealing with a case of an express power of advancement, and, having reviewed *In re Stimpson's Trusts*,[11] he said this: "In these circumstances, the argument which appealed "to Neville J. in *In re Hodgson*,[12] and appeals to me, was not "available. It may be that the decision in *In re Stimpson's*

[3] [1935] Ch. 562, 566.

[4] [1913] 1 Ch. 34, 40.

[5] [1951] Ch. 833; [1951] 1 T.L.R. 470; [1951] 1 All E.R. 656.

[6] [1931] 2 Ch. 77.

[7] [1913] 1 Ch. 34.

[8] [1951] Ch. 833, 840.

[9] [1931] 2 Ch. 77.

[10] [1913] 1 Ch. 34.

[11] [1931] 2 Ch. 77.

[12] [1913] 1 Ch. 34.

"*Trusts* [13] may hereafter be followed in a case where an express "advancement clause is lacking and where, on the other hand, "no use is made of the protective trusts set out in section 33 of "the Trustee Act, 1925. I leave that question to be decided "when it arises." [14] But, in my judgment, if the true view be, for the reasons which I have given, that section 32 must be read into the will, there can be no possible difference between a will containing an express provision written out in extenso and a will which incorporates section 32. Nor do I see how the fact that a will contains a clause setting out protective trusts in extenso instead of incorporating section 33 can affect the matter.

I forbear to examine *In re Stimpson's Trusts* [15] in detail. The judgment of Luxmoore J. upon the point at issue in the present case is not reported. I do not know what authorities were cited to him, nor for what reasons he came to the conclusion which he did. In any event, that decision is plainly distinguishable from that before me for, in that case, the will was made in 1906, though it did not come into operation until the year 1929. But, nevertheless, the draftsman of the will in 1906 cannot have had in mind the section of an Act to be enacted nearly 20 years later, whereas in the present case I have no reason to doubt that there was no express provision about advancement put into the will because the draftsman in 1935 of the will before me must be taken to have been well aware of and to have relied on section 32.

Accordingly, for these reasons, it seems to me that the reasoning of *In re Hodgson* [16] and *In re Shaw's Settlement* [17] is applicable to a case where section 32 is incorporated into a will, whence it follows that a life tenant, by consenting to an advance, does not thereby forfeit his life interest.

Declarations accordingly.

Solicitors: *Church, Adams, Tatham & Co. for Rees & Wood, Cardiff.*

[13] [1931] 2 Ch. 77.
[14] [1951] Ch. 833, 840.
[15] [1931] 2 Ch. 77.
[16] [1913] 1 Ch. 34.
[17] [1951] Ch. 833.

1953
Nov. 24,
25, 26;
Dec. 16.

Lloyd-Jacob J.

In re WHEATCROFT BROS. LD.'S TRADE MARKS.

[1953 W. No. 526.]

Trade Mark—Registration—Name of plant—Roses—Trade marks the "variety" names—Variety names sole designation of a rose—Not distinctive — Confusion — Wrongly registered — Rectification of register—Trade Marks Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 22), *ss.* 9, 11 (1), 15, 32 (1).

"*Distinctive mark.*"

The variety name of a rose being the sole designation of a particular type of rose to both the trade and public, it cannot be validly registered as a trade mark under the Trade Marks Act, 1938, to denote the rose of a particular proprietor.

The respondents, a firm of rose growers, had registered 11 variety names as trade marks in respect of roses. They failed to disclose in the application for registration that they were the variety names. Application was made by another firm of rose growers under section 32 of the Act for the rectification of the register of trade marks by removal of the marks, on the grounds, (1) that the variety names could not be distinctive within the meaning of section 9 and were therefore wrongly registered; (2) that their continuance on the register would cause confusion and was contrary to section 11. The evidence was that variety names were registered with the National Rose Society, and were alone used by the trade and public as the designations of particular roses.

The respondents contended, inter alia, that the objection that a trade mark was invalid because it was the descriptive name of an article should be determined by section 15, and not by sections 9 and 11:—

Held, (1) that variety names could not be distinctive of the roses of the respondents as required by section 9, and had it been disclosed on registration that they were the variety names they would not have been registered; they were therefore wrongly registered;

(2) that the continuance on the register of these marks would in the circumstances inevitably cause confusion, and constitute an impediment and embarrassment to traders, and they must be expunged from the register;

(3) that section 15 was concerned only with what occurred after registration, and could not restrict investigation into distinctiveness under section 9, or into the question of confusion under section 11, so that the contention under that section failed; that section, moreover, contained a positive direction to deem as wrongly registered any mark which by reason of concurrent user in a descriptive sense would occasion deception or confusion.

MOTION.

Wheatcroft Bros. Ld., a firm of rose growers, were the registered proprietors of 11 trade marks, registered in respect of roses; the marks being "Coppelia," "Cocorico," "Pigalle," "Concerto," "Confidence," "Mahina," "Mascotte," "Moulin "Rouge," "Tzigane," "Festival" and "Magali." Wisbech Plant Co. Ld., who were also rose growers, applied under section 32 [1] of the Trade Marks Act, 1938, for the removal of the marks on the grounds that the registrations were made without sufficient cause, and that the marks were wrongly registered, and wrongly remained on the register in contravention of sections 9 and 11 of the Act.[1]

The evidence was that it was the custom of the rose trade to have only one name for each variety of rose; and all known varieties of roses and each new variety as it was introduced were registered with the National Rose Society under their Rose Registration Scheme. The variety name alone was used by the trade and public to designate a particular rose. The respondents had, with the exception of "Concerto" and "Festival," registered the trade marks in issue with the National Rose Society before registration as trade marks. There was no evidence of intention not to use any of the marks as variety names.

---

[1] Trade Marks Act, 1938, s. 9: "(1) In order for a trade mark . . . "to be registrable in Part A of the "register, it must contain or consist "of at least one of the following "essential particulars . . . (*d*) a word "or words having no direct reference "to the character or quality of the "goods . . . (*e*) any other distinctive "mark. . . .

"(2) For the purposes of this "section 'distinctive' means adapted, "in relation to the goods in respect "of which a trade mark is registered "or proposed to be registered, to "distinguish goods with which the "proprietor of the trade mark is or "may be connected in the course "of trade from goods in the case of "which no such connexion subsists. ". . ."

S. 11: "It shall not be lawful "to register as a trade mark or part "of a trade mark any matter the use "of which would, by reason of its "being likely to deceive or cause con-"fusion or otherwise, be disentitled "to protection in a court of justice, ". . ."

S. 15: "(1) The registration of a "trade mark shall not be deemed to "have become invalid by reason only "of any use, after the date of the "registration, of a word or words "which the trade mark contains, or of "which it consists, as the name or "description of an article or sub-"stance: Provided that, if it is proved ". . . (*a*) that there is a well-known "and established use of the word . . . "as the name or description of the "article . . . by . . . persons carrying "on a trade therein, not being use in "relation to goods connected in the "course of trade with the proprietor ". . . (2) Where the facts mentioned "in paragraph (*a*) . . . of the proviso to "the foregoing subsection are proved "with respect to any word . . . then "(*a*) if the trade mark consists solely "of that word . . . the registration of "the trade mark, so far as regards "registration in respect of the article ". . . in question . . . shall be deemed "for the purposes of section thirty-two "of this Act to be an entry wrongly "remaining on the register. . . ."

S. 26: ". . . a registered trade "mark may be taken off the register "in respect of any of the goods in "respect of which it is registered on "application by any person aggrieved "to the court . . . on the ground . . . "(*a*) that the trade mark was regis-"tered without any bona fide inten-"tion on the part of the applicant for "registration that it should be used "in relation to those goods by him, "and that there has in fact been no "bona fide use of the trade mark in "relation to those goods by any pro-"prietor thereof. . . ."

S. 32: "(1) Any person aggrieved "by . . . any entry made in the "register without sufficient cause, or "by any entry wrongly remaining on "the register, . . . may apply . . . to "the court . . . and the tribunal may "make such order for . . . expunging "or varying the entry as the tribunal "may think fit."

Basil Drewe Q.C. and *T. A. Blanco White* for the applicants, Wisbech Plant Co. Ld. It is a definite custom in the trade that a rose is known only by its variety name; the use of any other name would not be understood. The registration of these variety names was an attempt to use the provisions of the Trade Marks Act to obtain a complete and perpetual monopoly in certain varieties of rose. If the marks are not expunged, it would give the respondents a monopoly similar to a patent in these varieties, differing in that, instead of being for 16 years, it would be perpetual. In patent law there are provisions for the prevention of a monopoly, but there are no such restrictions in trade mark law. The attempt to obtain trade mark rights in these circumstances is not what the law intended.

This application is made under section 32 on the ground that the entries were made without sufficient cause. The applicants also contend that the registrations are contrary to section 26, in that the respondents had no bona fide intention to use the marks as trade marks.

The registrations are invalid for the following reasons: (1) the marks being purely descriptive they cannot be distinctive of the respondents' roses; (2) as they are the variety marks registered with the National Rose Society they are inherently incapable of being distinctive; (3) there was no bona fide intention to use a trade mark as required by section 26; (4) the registrations were made for the purpose of preventing other traders from the legitimate use of the variety names, and therefore disentitled to protection in a court of law: see section 11.

The marks, except "Concerto" and "Festival," were registered with the National Rose Society before registration as trade marks, but there is no evidence that these two marks will not be used as variety names.

It is not suggested that it is impossible to have trade marks for roses if a suitable mark or device were selected and the public taught to recognize it, but "Moulin Rouge," for instance, does not mean a rose emanating from Wheatcrofts, but a specific variety of rose. Without that name it would be impossible to describe that rose, and it is the name which anybody must use when referring to this rose. It would be impossible in the course of trade to prevent reference to this rose as "Moulin Rouge."

The respondents had by their own act made these marks variety names, and they cannot now stop a trader who had bought a "Moulin Rouge" rose, second or third hand, from using that name; it is descriptive (and the only description) of this rose, and no one can prevent its use as such. That is the fundamental basis of the case.

The judgments in *In re Leonard & Ellis's Trade Mark* [2] would apply equally to this case. [Reference was also made to *Philippart* v. *Wm. Whiteley Ld.*,[3] *In re Williams Ld.'s Application* [4] and *In re H. N. Brock & Co.*[5]]

Blanco-White following. Apart from "Concerto" and "Festival," each of the names was at the date of the application for registration already registered with the National Rose Society as a variety name and was so used in commerce. "Concerto" has now become the variety name of a rose, and since registration all the marks have been used as variety names in the customary way. The respondents have never used the marks as trade marks; there has been sporadic use of the words "Registered Trade "Mark" in catalogues, but this was colourable only, and did not constitute use of them as trade marks. The word "Festival" was registered to protect the rose known as "Cannes Festival," which could not be registered under that name because of the geographical significance. "Festival" was a rose in commerce in the United States of America and was also the name of a rose in the National Rose Society's trial ground.

At this stage the applicants will not argue their objection raised under section 15 (1) (*a*).

Geoffrey Tookey Q.C. and *P. S. Bevan* for the respondents, Wheatcroft Bros. Ld. The real question in this case arises under section 26. To determine the intention with which the marks were registered, use before and after registration must be taken into consideration; it is not possible to judge use over a period as short as the present. All the marks have been used as trade marks, that is, as fancy names in front of the name of an article; "Concerto" does not designate an article; the article is a rose.

---

[2] (1884) 26 Ch.D. 288.

[3] [1908] 2 Ch. 274; 24 T.L.R. 707; 25 R.P.C. 565.

[4] (1917) 34 R.P.C. 197.

[5] [1910] 1 Ch. 130; 26 T.L.R. 100; 26 R.P.C. 850.

It is the intention to change the present system in the trade and to use as names for roses words, which could, and should be registered as trade marks. It was the custom of the trade to have "open" variety names; and the trade is quite capable of understanding a name which is also a trade mark. There must be a limit to the extent to which a mark is invalidated because it is the name of an article. It is common practice for a trade mark to be the name of an article. This may arise where one owner has two trade marks for different articles, for instance, "Ford Consul" and "Ford Zephyr." "Consul" and "Zephyr" are trade marks, but they both identify the model of a car. The rose trade can be educated in this way.

The case can be summarized by eight points, in which the trade mark "Concerto" may be taken as an example: (1) "Concerto" was at the date of registration qualified for registration under section 9 (1) (*d*) as a word having no direct reference to the character or quality of the goods. (2) Any objection, therefore, that the word had direct reference to the character or quality of the goods must be based on the fact that it might be used as a variety name of a rose. That proposition is far too broad; it would prevent the registration of any word marks not previously used, even if there were no intention to use them as variety names or in connexion with one variety of rose. (3) This applies equally to section 11; there is nothing inherently confusing or deceptive about the word "Concerto." (4) The registration was validly effected. (5) The applicants place no reliance now on their plea under section 15 (1) (*a*). (6) Under section 26 the applicants must show that the respondents registered the mark without any bona fide intention to use it as a trade mark. They do not discharge the onus merely by showing that the mark has been, or was intended to be, used as the variety name of a rose, since section 15 permits the use of the same mark as a trade mark and as the name of an article. To discharge the onus under section 26 they must show that there was no bona fide intention to use the mark to indicate a connexion in the course of trade between the rose and the respondents or their registered users. That must be decided on the evidence as a whole. (7) If "Concerto" was not validly registered none of the others were. (8) If "Concerto" was validly registered then all the other marks were, since the material circumstances do not differ. Those marks used before registration were used exclusively in relation to the respondents' roses.

Bevan following. The allegation that the registration is an abuse of monopoly only amounts to use as variety names. This is permitted by section 15, so long as the use does not spread to other traders. The applicants cannot, therefore, rely on a charge of monopoly on that ground.

The argument that the marks were not distinctive at the date of registration must mean that the marks at that date meant only the variety names and nothing else. Here some of the marks had been brought to the notice of the public, but only as emanating from the respondents. There was no evidence that at that date the marks were regarded as purely descriptive; it is wholly a matter of inference.

Section 15 must affect the definition of a trade mark, which fact must be remembered when considering the earlier cases. *In re Leonard & Ellis's Trade Mark*,[6] *Philippart* v. *Wm. Whiteley Ld.*[7] and *In re Williams Ld.'s Application*[8] are distinguishable on their facts.

It was argued that other names of roses used in the same way as these marks were variety names, and therefore these marks also were variety names, this being the custom of the trade. That contention is not open on the pleadings. The rights of a trade mark proprietor cannot be limited or extended by custom of the trade; it is not possible to say that this mark would be registrable for cigarettes, but not for roses, so that the respondents can have no trade mark rights in these names.

Section 9 is concerned only with the nature of the mark itself; once the mark is registered the owner is entitled to use the mark so that it becomes the name of the article and the trade mark. Even if the registrar had been so informed there would have been no objection. The only intention here was to do what is permitted under section 15. There is no evidence of intention to dedicate these marks to the public, only an intention that they should be the variety names of the respondents' roses.

Drewe Q.C. in reply. *In re Leonard & Ellis's Trade Mark*,[9] *Philippart* v. *Wm. Whiteley Ld.*[10] and *In re Williams Ld.'s Application*[11] remain the law today and they are directly in point. Section 15 does not affect them; it is concerned with a different position, where, as in *Woodward Ld.* v. *Boulton Macro Ld.*[12] (which is overruled by the section), the owner of a mark stands

---

[6] 26 Ch.D. 288.

[7] [1908] 2 Ch. 274.

[8] 34 R.P.C. 197.

[9] 26 Ch.D. 288.

[10] [1908] 2 Ch. 274.

[11] 34 R.P.C. 197.

[12] (1915) 32 R.P.C. 173.

1953

WHEATCROFT BROS. LD.'S TRADE MARKS, *In re.*

by while other traders use it as the name of their goods, and then sues them as soon as his mark is seven years old.

If at the date of registration the registrar had been told that each of the marks would be used only for a single variety of rose, and would be so registered with the National Rose Society, for what specification of goods could he have registered them? The respondents cannot be in a better position because the registrar did not know the whole circumstances. The marks cannot be registrable merely because the trade custom may be changed in future; registration with the National Rose Society amounts to dedication to the public use, and the trade is entitled to use these names in the same way as any other variety name.

In the present case, which resembles the type of case of *In re Williams Ld.'s Application* [13] and not that of *La Société Le Ferment's Application*,[14] the word cannot be both a name and a trade mark; "Coppelia" cannot be Wheatcroft's brand of a particular class of rose; a rose is a "Coppelia" or it is not. The position is different with a model of a motor-car or a brand of cigarettes, as the name imports the manufacturer's skill and knowledge as well as the type. It is contrary to public policy to use trade mark registrations to monopolize trade in an article: see *Philippart* v. *Wm. Whiteley Ld.*,[15] *per* Parker J.

Cur. adv. vult.

Dec. 16. LLOYD-JACOB J., reading his judgment. By this motion the applicants, Wisbech Plant Co. Ld., seek the rectification of the trade mark register by the removal therefrom of 11 trade marks standing in the name of the respondents, Wheatcroft Bros. Ld., all of which were registered without proof of distinctiveness, five of which are entered upon the register in respect of "Roses, Rose Cuttings and Rose Trees" and the remaining six in respect of "Rose Plants." As the evidence disclosed, this variation in the classification of goods has no genuine significance in relation to the points for consideration, and it calls for no further mention. The locus standi of the applicants was admitted, and evidence and argument were directed to the issues of the propriety of the original admission of these marks to the register and of the continuance of the marks thereon since registration.

The applicants, in their statement of case, asserted a ground of objection under section 15 (1) (*a*) of the Trade Marks Act,

---

[13] 34 R.P.C. 197.

[14] (1912) 29 R.P.C. 497.

[15] [1908] 2 Ch. 274, 285.

1938, but this objection, although retained by the applicants for future consideration should an opportunity arise on appeal, was not developed in argument, nor was I invited to deal with it. One other preliminary matter requires to be stated. The respondents did not attempt to support by evidence the contention particularized in their statement of defence that certain combinations of letters and figures as therein set out had come to be identified in the public mind with certain varieties of roses. This contention will not therefore qualify for further notice.

By section 49 of the Trade Marks Act, 1938, the tribunal in a proceeding relating to a trade mark is required to admit evidence of the usages of the trade concerned. It will be convenient to summarize this evidence by way of introduction. There has existed, since the year 1876, an organization called the National Rose Society, with a present membership exceeding 25,000, one purpose of whose existence is to encourage and develop the cultivation of roses in this country. Certain of the members of this society, being professional rose growers, are also members of the Association of British Rose Producers, and for convenience of reference these two organizations can be respectively termed the " society " and the " association."

A new rose variety is developed as a consequence of experimentation by a " rose raiser " in the cross-fertilization of existing varieties, and it would appear that only a very small percentage of the seedlings so produced are found to be sufficiently outstanding to justify introduction to the market. When one such is developed and a sufficient stock of rose trees created therefrom by budding, the raiser or an associate to whom he has entrusted the task of introducing the variety to the market, and called the " introducer," will seek to procure publicity for the variety, in order that the purchasing public may be encouraged to buy and plant examples of it. For this purpose an acceptable designation of the variety is essential. The raiser or introducer may himself offer for sale, and sell the new variety in the form of trees or bushes ready for planting, or he may dispose of buds of the new variety to professional rose growers for them to use in the development of trees and bushes. The designation chosen is referred to as the name of the rose, and it is the usual practice for rose growers to publish catalogues wherein the roses they offer for sale are identified by name, and to guarantee that goods supplied in response to orders will be found to be true to name. They can secure supplies of a variety introduced by some other grower by direct purchase from him of trees and bushes or of buds for implantation into stock of their own choosing, or indirectly by acquisition of trees or bushes of the required variety from persons in possession of the same, which trees and bushes may provide a quantity of buds or grafts with which to propagate further supplies. This propagation may be effected so rapidly that by the time the merits of a new introduction and the publicity efforts of its introducer have operated to create a substantial public demand, rose growers other than the introducer will be possessed of supplies with which to satisfy the requirements of the public, and this even though the introducer, by refraining from supplying his competitors directly with either trees or bushes or buds, had sought to maintain his exclusive dealing.

The evidence established that the identification of a variety of rose was in practice secured by examination of the blooms, and as these are produced from the budded or grafted portion of the tree or bush, the nature and origin of the root stock are of no particular significance for such identification, although they may vitally affect—as will the skill and effectiveness of the budding—the habit and strength of the tree or bush.

Difficulty in a number of instances appears to have been experienced before 1948 due to the use of a plurality of designations in respect of examples of a single variety of rose, and in that year the society introduced what was termed the Rose Registration Scheme, whereby a list was compiled containing one identifying name in respect of each known variety, and the society accepted the responsibility of registering for the benefit of all concerned with roses the identification name attached by the introducer to any new variety of rose submitted for the purpose.

The registration scheme secured the approbation of the association, which recommended its members not to use in their trade catalogues any identification name not recognized by the society. Amongst their other activities, the society maintains a trial ground, wherein rose trees submitted by members are planted and tended, and their habit and quality tested and noted. Upon the results of these trials certificates are granted for meritorious introductions, but only when an identifying name for the variety has been entered upon the society's register. The Rose Registration Regulations and the application form, the completion of which is an essential preliminary to the registration, were exhibited in evidence.

In completing the application form, the introducer asserts the variety to be new and in this country previously unnamed, and must propose for registration the name that he suggests for its future designation. The regulations include a provision that exhibition of a variety under a name other than the name registered shall render the exhibit liable to disqualification in any competition to which the powers of the society extend. Speaking generally, it is by exhibition at flower shows sponsored by the society and by the receipt of certificates, medals and the like awards given by the society, that an introducer may expect to bring his variety to the notice of the interested public. It is, I think, a fair conclusion on the evidence that at the present time an introducer could not expect to popularize a new variety without meeting the requirements of the society in respect of registration and, if a member also of the association, it would be possible for him to commence to market supplies of it in the ordinary way of business under a name not registered with the society only by disregarding the association's specific recommendation. Indeed, as the respondents fairly acknowledged in evidence, it would be wholly impracticable to designate a rose in the course of trade by a name other than that under which the variety was registered with the society, and they further acknowledged that should this be attempted, chaotic conditions would result.

It is against this background of trade usage that the particulars of the registrations in suit fall to be considered. The respondents, having accepted the task of introducing new varieties raised abroad into the market in this country, sought to carry out that task in such a way as to ensure, first, the availability only of satisfactory examples, and second, a reasonable financial return to the raiser and his associates. In pursuance of these purposes, the respondents agreed with their principals abroad to follow a particular course of action, whereby the designation selected for a new variety was to be registered with the society, and as soon as reasonably possible thereafter registered as a trade mark. With two exceptions (registered trade marks No. 701,611 "Concerto" and No. 709,608 "Festival") this procedure was followed in respect of the trade marks in suit, and the exceptions in no way indicate any desire to modify the procedure in principle.

In this way it was hoped that the designation would, by reason of its registration with the society, become the means whereby the variety could alone be identified, and further, by reason of its registration as a trade mark, be available to indicate a connexion in the course of trade between articles so designated and the proprietors and registered users of the registered trade mark, so as to preclude unauthorized growers from offering supplies.

The present proceedings are based upon the provisions of section 32 of the Act, which, shortly stated, permit the removal from the register of trade marks of entries therein made without sufficient cause, or which wrongly remain therein. So far as concerns each original entry, the applicants seek to establish that the statutory requirements contained in section 9 of the Act were not complied with, and so far as concerns each original registration and its continuing presence upon the register they contend that the provisions of section 11 render both unlawful.

The prerequisite for registration in Part A of the register as set out in section 9 is distinctiveness, "distinctive" being defined in subsection (2) as meaning "adapted to distinguish "goods with which the proprietor of the trade mark is or may be "connected in the course of trade from goods in the case of "which no such connexion subsists." Such distinctiveness may be established in the case of certain categories specified in the section merely by inference, and in other cases by affirmative evidence. All the registrations in suit were accepted as inferentially distinctive, on the ground that each consisted of a word having no direct reference to the character or quality of the goods.

Seeing that the classification of goods in respect of which registration was sought was expressed broadly to cover all varieties of rose, there was of course no reason for the registrar to suspect that the averment that the mark was proposed to be used, as contained in the application form, was true only in relation to one particular variety of rose, and still less reason for him to be put upon inquiry as to the characteristics or qualities possessed by such variety, so as to permit him to determine the absence of any direct reference in the mark propounded for registration.

In the light of the evidence before me, it is clear that at the respective dates of application for each of these marks, the respondents intended only to use each mark in relation to one variety of rose, which variety as they well knew and intended either was or would be characterized by the same name recorded in the register of the society. Had the application form accurately reflected these intentions the registrar could not have regarded the mark proposed as inferentially distinctive. An intention to use the mark as the name of a variety appears to be wholly inconsistent with a bona fide intention to use it as signifying a connexion in the course of trade with the supplier, for which purpose it must necessarily be capable of differentiating between examples of the same variety coming from differing trade sources.

If the question be posed: was the name intended for use to distinguish rose trees of the respondents' growing from rose trees of the same variety grown by others, or was it intended for use to distinguish one variety introduced by the respondents from the generality of roses, there can be only one answer, for the inevitable consequence of registration with the society was to give the name a variety status. The evidence which establishes this is not questioned, and the desire of the respondents to prevent other rose growers from offering supplies of any of these new varieties save under specific authorization, even if successful, would not affect the intention to use as such, but would merely condition the circumstances in which roses so named were dealt with in commerce.

Once the respondents decided to invite the society to accept any particular name as an identification of the variety to which it was applied, they put it out of their power to intend the name only to identify such instances of the variety as they themselves had raised. If they can contrive some manner of monopolizing the production of a particular variety, it is true that the variety name will not fall to be used save upon their products. This possibility, although it might conceivably permit the respondents to create and acquire a secondary meaning for the original variety name, would certainly not justify a registration granted without evidence of distinctiveness.

The propriety of these registrations being called in question, I am satisfied that the court is entitled, and indeed bound, to examine the objection under section 9, in the light of all the evidence adduced. So examined, registrations Nos. 700,985 "Cocorico," 701,614 "Pigalle," 709,607 "Coppelia," 709,605 "Magali," 709,609 "Moulin Rouge," 701,613 "Mascotte," 700,984 "Tzigane" and 709,606 "Mahina" do not qualify under section 9 (1) (*d*), and were therefore entered upon the register without sufficient cause.

Similar reasoning as to lack of distinctiveness likewise condemns registration No. B 701,612 "Confidence." With regard to Nos. 701,611 "Concerto" and 709,608 "Festival," these marks were registered before any application had been made to the society for their entry as variety names. The precise reason for this inversion of the designed procedure was not specified in respect of No. 701,611 "Concerto," and was due so far as concerned "Festival" to the circumstance that the originally designed name for the variety, "Cannes Festival," was in fact registered with the society as a preliminary to registration as a trade mark, but the requirements of the trade mark registry caused the geographical reference in the name to be dropped at the application stage. As I am satisfied that in neither instance was any departure from the intended use proposed, these registrations are equally vulnerable with the others for the same reasons.

Turning now to the objection under section 11, the evidence satisfies me that to the thousands of persons acquainted with the rose registration scheme of the society, the use of any name entered upon that register as importing a reference to trade origin would inevitably cause confusion. Moreover, save upon the footing that sellers other than the respondents will have no opportunity of meeting demands for these varieties when expressed in the only manner open to the buyer for the identification of his requirements, the inevitable result of leaving these marks on the Register of Trade Marks would be to impede the efforts of such other traders and to embarrass both them and their customers.

The evidence affords no grounds for assuming either a future inability on the part of growers to produce any of the varieties to which the marks in suit are assigned or the absence of any public demand for their products under their variety names. It is, of course, true that production of such varieties will require for its inception the receipt of some supply of stock from the respondents' growing, but neither procurement of supplies nor production of stock therefrom need involve any unlawful act as the law now stands. If, therefore, it be right to postulate a state of affairs wherein willing sellers and willing buyers are minded to deal in these commodities, the imposition of a clog upon their means of identifying the subject-matter of their dealing must operate in restraint of trade.

In my judgment, section 11 of the Act requires this court to safeguard the free operation of normal trade channels from such interference so far as it proceeds under the protection of trade mark registration. For this reason the entries in respect of all the marks the subject of this motion wrongly remain upon the register and must be expunged therefrom.

It was strongly urged upon me by counsel for the respondents that having regard to the provisions of section 15 of the Act, the objection that a trade mark is invalid because it is the descriptive name of an article falls to be determined according to the terms of that section and not under sections 9 and 11. This submission must be rejected. With the exception of subsection (3) of section 15 (which relates to chemical substances and is therefore not in point) this section is concerned with what has developed after the date of registration. It cannot therefore operate to restrict or avoid the investigation into distinctiveness which by section 9 is imposed upon the registrar at the application stage, and the use of the expression " by reason only " in subsection (1) shows that no substitute for the investigation under section 11 was intended. If the legislature had intended to permit the continued registration of marks which in use were causing deception and confusion, much plainer direction would have been found in the statute.

If the argument with regard to section 15 be put somewhat differently and it be submitted that the section should be taken as a guide to the proper decision in cases where concurrent use as a trade mark and as a description was to be anticipated, the respondents would fare no better.

If the whole of section 15 be closely examined, it will be found that it contains a positive direction to deem as wrongly registered any mark which by reason of concurrent use in a descriptive sense could occasion deception or confusion, and this irrespective of the intentions of the registered proprietor as to its use.

Where, as here, the respondents themselves promote and adopt the descriptive use, they cannot complain of the consequential effect upon the validity of the trade mark.

Having had the advantage of seeing and hearing Mr. Harry Wheatcroft in the witness box, it is only right to add that the respondents appear to have intended no impropriety. Being convinced, as he was, that the welfare and prestige of British rose growers required the establishment of some control over the marketing of new varieties, this gentleman appears to have been

1953

WHEATCROFT BROS. LD.'S TRADE MARKS, *In re.*

Lloyd-Jacob J.

assured that the registration of variety names as trade marks would create an opportunity, and the introduction into trade mark law of the registered user provisions would enable the respondents to authorize, under properly controlled conditions, the supply of their new varieties to the public by suitably qualified growers. I accept from him that the respondents desired to protect the public from obtaining poor examples of new varieties, and were wishful only to secure fair and equitable terms upon which the industry could collaborate with them.

Although the respondents must bear the consequences of having failed to disclose to the registrar the correspondence they intended between variety name and trade mark (but for which failure the marks would never have been registered nor these proceedings have been possible), I have no ground for attributing to them any personal knowledge of this default. What they were really seeking was a means or method of preventing the use of stock of their growing for the propagation of rose trees and bushes by unauthorized professional rose growers, such as is provided by the domestic patent law in some other countries. In so doing, they adhered to an earlier understanding in relation to the tenth commandment, and overlooked the modern gloss which A. H. Clough felicitously expressed in "The Latest Decalogue" as

"Thou shalt not covet, but tradition
"Approves all forms of competition."

For the purpose the respondents had in mind I am satisfied that the registration of the trade marks in suit was of no avail, for they were not validly registered, nor can they properly remain on the register. Accordingly, I must direct the rectification of the register as prayed.

Application granted.

Solicitors: *Metcalfe, Copeman & Pettefar; Smith & Hudson for Day, Johnson & Boot, Nottingham.*

I. G. R. M.

In re CAMPBELL COVERINGS LD. (No. 2).

1954
Jan. 11.

Wynn-Parry J.

[No. 00108 of 1953.]

Company—Voluntary winding up—Suspected fraud by director—Application by liquidator for public examination of director—Jurisdiction to direct such examination in voluntary winding up—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *ss.* 270 (1), 307 (1).

In the course of the voluntary liquidation of a company the liquidator came to suspect that one of the directors had committed a fraud. He reported the matter, pursuant to section 334 (2) of the Companies Act, 1948, to the Director of Public Prosecutions, who referred the matter to the Board of Trade under section 334 (3), under which subsection an order was made conferring on an assistant official receiver the powers conferred in a compulsory winding up to make an investigation.

The official receiver made an investigation and presented a report. He applied under section 334 (3) for an order for the public examination of the director in question, pursuant to section 270 (1). Roxburgh J. refused to make an order, and his decision was affirmed on appeal, though on a different ground. In dismissing the appeal, Evershed M.R. (with whom Denning and Romer L.JJ. agreed) disapproved the view of Roxburgh J. that, to found jurisdiction for making an order under section 270 (1) in a voluntary winding up, there must have been a "further report" by the official receiver under section 236 (2). He further stated that it was his view, as at present advised, that there would be jurisdiction to make the order prayed on an application under section 307 (1) by one of the persons therein specified.

The liquidator (being one of such persons) accordingly took out a summons under that subsection asking for similar relief, and, on the dismissal of the summons by the registrar, moved the court to discharge the registrar's order:—

Held, that under section 307 (1) the court had jurisdiction to order the public examination of the director in question, pursuant to section 270 (1), the provision in the latter subsection that the official receiver should have made a further report being inapplicable in a voluntary liquidation, since to give effect to it would defeat the plain intention of Parliament.

Decision and dicta of Evershed M.R. in *In re Campbell Coverings Ld.* [1953] Ch. 488; [1953] 2 All E.R. 74 followed.

MOTION.

On June 1, 1950, Campbell Coverings Ld. passed a special resolution for voluntary winding up. On July 23, 1952, the liquidator made a report to the Director of Public Prosecutions under section 334 (2) of the Companies Act, 1948, alleging malpractices in the company's affairs. On that report, an order was made pursuant to section 334 (3) that there should be conferred on one of the assistant official receivers "all such "powers of investigating the affairs of the said company as are "provided by the said Act in the case of a winding up by the "court."

On March 18, 1953, the assistant official receiver reported to the court that the public examination of one of the former directors was desirable. On March 19 he applied to Roxburgh J. for an order under section 270 (1)[1] directing such examination. Roxburgh J. refused the application on the ground that it was a condition precedent that the official receiver should have submitted both a preliminary and a further report as required by subsections (1) and (2) respectively of section 236. An appeal[2] to the Court of Appeal was dismissed, but Evershed M.R., in the course of his judgment, indicated that it was his present view that a similar application by the liquidator under section 307 (1) would be successful.

The liquidator accordingly took out such a summons asking for similar relief. Mr. Registrar Wilson made no order, basing his decision on a number of authorities. The liquidator then moved for an order that the registrar's order be discharged, that the report of the assistant official receiver be considered, and that the director in question be ordered to appear for public examination.

Denys Buckley for the liquidator. Notwithstanding the clear view expressed by Evershed M.R. in *In re Campbell Coverings Ld.*,[2] the registrar made no order on the summons. The registrar first expressed the view that the matter should not be heard ex parte. As to that, it would be possible to adjourn the summons for the individual in question to be served, but it would serve no useful purpose if he appeared, because he would not be allowed to see the official receiver's report, and could make no proper submissions on the merits. The matter is discretionary, and the judge has the opportunity of considering the report fully before making an order.

---

[1] Companies Act, 1948, s. 270: "(1) Where an order has been made "in England for winding up a company by the court, and the official "receiver has made a further report "under this Act stating that in his "opinion a fraud has been committed "by any person . . . the court may, "after consideration of the report, "direct that that person . . . shall "attend before the court on a day "appointed by the court for that purpose and be publicly examined . . ."
S. 307: "(1) The liquidator or any "contributory or creditor may apply "to the court . . . to exercise, as "respects the enforcing of calls or "any other matter, all or any of "the powers which the court might "exercise if the company were being "wound up by the court."

[2] [1953] Ch. 488, 494; [1953] 2 All E.R. 74.

The registrar also considered that a public examination could not be ordered in a winding up under supervision, and could not, a fortiori, be ordered in a winding up not under supervision. That is a misconception: a consideration of sections 311, 313, 315 of, and Sch. XI to, the Companies Act, 1948, shows that a winding up under supervision always remains a voluntary winding up, and in such a case the liquidator can apply under section 307 for an order under section 270, as it is submitted that he can in an ordinary voluntary winding up.

The registrar further considered a number of authorities: *In re 1897 Jubilee Sites Syndicate*[3]; *In re Medical Battery Company*[4]; *In re Doré Gallery Ld.*[5]; *In re Watson & Sons Ld.*[6]; *In re National Debenture and Assets Corporation*[7]; *In re Russell, Cordner & Co.*[8]; *In re Krasnapolsky Restaurant and Winter Garden Co.*[9]; *In re The Varieties Ld.*[10]; *In re Haycraft Gold Reduction and Mining Co.*[11]; and *In re Gutta Percha Corporation.*[12] From these he came to the conclusion that the proper course, where there is suspicion of fraud, is for the Board of Trade to petition for a compulsory winding up. The cases do establish the proposition that in a proper case the court may order a compulsory winding up; they do not establish the proposition that the court cannot, if it is more convenient, exercise more limited powers under section 307 (1).

The power to order a public examination under section 270 is clearly a power exercisable by the court in a winding up by the court. By section 307 (1) the court may in a voluntary winding up exercise all the powers exercisable in a winding up by the court. The view expressed by Evershed M.R. at the hearing of the previous application[13] should be followed.

WYNN-PARRY J. This is a motion brought by the liquidator of the company in voluntary liquidation asking that an order made by the registrar on December 7, 1953, may be discharged, and also asking for further relief which, in the view which I take of the procedure which should be followed, I need not further mention. [His Lordship stated the facts, referred to the previous summons, and continued:]

---

[3] [1899] 2 Ch. 204; 15 T.L.R. 391.
[4] [1894] 1 Ch. 444.
[5] [1891] W.N. 98.
[6] [1891] 2 Ch. 55; 7 T.L.R. 356.
[7] [1891] 2 Ch. 505; 7 T.L.R. 485.
[8] [1891] 3 Ch. 171.
[9] [1892] 3 Ch. 174.
[10] [1893] 2 Ch. 235; 9 T.L.R. 259.
[11] [1900] 2 Ch. 230; 16 T.L.R. 350.
[12] [1900] 2 Ch. 665.
[13] [1953] Ch. 488, 497.

On March 30, 1953, the summons taken out by the official receiver came before Roxburgh J., who made no order thereon. The matter was taken to the Court of Appeal, which affirmed the conclusion of Roxburgh J., though for a different reason.[1] Evershed M.R., who delivered the leading judgment, having first dealt with the reasons which underlay the judgment of Roxburgh J., referred to the argument of Mr. Buckley which had advanced the proposition that no "further" report under section 236 (2) was required, or, indeed, could be made, as the liquidation was a voluntary liquidation. It was the absence of that "further" report, which in his view must be in existence to ground jurisdiction in the court to make an order, that led Roxburgh J. to the conclusion to which he came. Evershed M.R. said[2]: "With all respect to Roxburgh J., I agree with "Mr. Buckley that the requirement of a further report, as "specified in section 236, ought not to be regarded as a condition "precedent to an order under section 334. In section 334 the "legislature is saying that certain powers may be exercised in a "voluntary winding up, being powers which in a compulsory "winding up would be exercisable only if certain things, which "could only be done in a compulsory winding up, had been "done." His Lordship then reviewed a number of sections of the Act and for a different reason came to the conclusion that Roxburgh J. was right in refusing to make any order.

Then his Lordship proceeded to throw out a suggestion which has in fact been followed. He said[3]: "But I do not think that "that conclusion is, from the point of view of those concerned "in this liquidation, a counsel entirely of despair. Section "307 (1) provides: 'The liquidator or any contributory or "'creditor may apply to the court . . . to exercise, as respects the "'enforcing of calls or any other matter, all or any of the powers "'which the court might exercise if the company were being "'wound up by the court.' An application under that section "must be made by the liquidator or a contributory or a creditor, "and the present applicant is the official receiver. If, therefore, "it is thought appropriate to set in motion the powers of that "section, another applicant will have to be found to make the "application. Since that application is not at present before the "court it would not be right for me to express a final view on

---

[1] [1953] Ch. 488; [1953] 2 All E.R. 74.

[2] [1953] Ch. 488, 494.

[3] Ibid. 497.

"any problems which might arise if it were before the court. "But the view which I have taken, with all respect to Roxburgh J., on the question whether there must be a 'further' "report in a voluntary winding up, no less than in a compulsory "winding up, applies where there is an application under section "307, no less than where application is made under section "334. I cannot suppose that when Parliament says that the court "may, on application, exercise any of the powers in a voluntary "winding up which it may exercise in a compulsory winding up, "it was saying at the same time that if the powers in a compulsory winding up require the existence of conditions which "could be only satisfied in a compulsory winding up, then those "powers could not in any event be available in a voluntary "winding up. Such a conclusion seems to be in conflict with "the express purpose and sense of section 307 (1).

"I am aware that I am expressing a view which is not in "accordance with the note of the editors of Buckley on the "Companies Acts (12th ed., p. 568), and I am, therefore, diffident in expressing a final conclusion on this matter. But, as "at present advised, my view is as I have stated." He then proceeded to point out that it would not necessarily follow, assuming that there was jurisdiction to make an order by virtue of section 307, that the court would in fact make the order. He continued [4]: "But for reasons which I have already indicated, I "say no more about what might happen if an application was "made under section 307. It is possible that other points may "arise which have not been discussed before us today."

The suggestion of Evershed M.R. was indeed followed, and on November 19, 1953, a summons was taken out by the liquidator asking that the report of the assistant official receiver should be considered and for an order that the director in question should be directed to attend for public examination. On December 7, 1953, Mr. Registrar Wilson refused to make any order on the summons and put his reasons in the form of a note which shows that he gave very careful consideration indeed to the matter; and now the question comes before me by way of a motion to discharge that order. The simple question is whether the view expressed by Evershed M.R., as being his view as then advised, is a view which should be followed on the ground that on careful investigation there is nothing which should operate to prevent its application. It is true that he expressed his view to be a view "as at present advised"; but, as I read his judgment, the only reason why he did not treat that view as a concluded and final view was not because he had any doubt as to the soundness of the reasoning which led to it, but only because further investigation might disclose some good reason against the application of that reasoning. He decided as part of his judgment that there was no need, in the application of section 334 to a voluntary liquidation, for the production of the further report requisite in the case of a compulsory liquidation, and he stated definitely in a passage which I have quoted that that reasoning must apply in the case of section 307 no less than in the case of section 334.

---

[4] [1953] Ch. 498.

That reasoning is such that I should feel in any case bound to follow it and apply it, if the further investigation which has now been made should disclose nothing to prevent its application. But after careful consideration of the matter, I would desire, with respect, to associate myself with that reasoning, and it therefore only remains for me to express my view on the result of the more detailed investigation which has since been made by the registrar involving the citing of a number of authorities.

There are only two cases which, it appears to me, in any way approach this question. The first is *In re 1897 Jubilee Sites Syndicate*,[5] which concerned a petition asking for the compulsory winding up of a company, and one of the grounds put forward was that a public examination was desirable. In the course of his argument Mr. Stewart-Smith, for the petitioner, said: "The private examination held under section 115 of the "Companies Act, 1862, has turned out to be insufficient, and "what is required is a public examination under section 8 of the "Act of 1890. But section 8 only applies when a compulsory "winding-up order has been made, and the official receiver, "therefore, now applies for that form of order under section 14 "of the Act of 1890. If this is not a case contemplated by the "framers of that provision, it is difficult to say when the section "does apply." The voluntary liquidator was represented by counsel and he objected to the making of a compulsory order, but put forward no suggestion that there was any other method of obtaining a public examination. The judge did not deal with this matter at all in his judgment. It is plain that it was never argued; and although the case would appear to have gone upon the basis that, in order to obtain an order for public examination, it would first be necessary for those who sought the order to institute proceedings for a compulsory winding up, the case is not an authority for saying that the section of the Companies Act, 1862, corresponding to section 307 could not be invoked. Indeed, the reason why this point was overlooked may be that the Act which was invoked was the Companies (Winding-up) Act, 1890, which itself introduced by section 8 public examination.

---

[5] [1899] 2 Ch. 204, 205; 15 T.L.R. 391.

The second case was *In re Medical Battery Company.*[6] There also a compulsory order was sought, and Mr. Bramwell Davis, who appeared for certain creditors, said in his argument: "The "company ought to be wound up by the court in order that there "may be a public examination under section 8 of the Companies "(Winding-up) Act, 1890. Such an examination cannot be "directed to be held in a winding-up under the supervision of "the court." No doubt that statement was correct, but the corollary does not follow that there must necessarily be a compulsory liquidation in order that a public examination can be directed. It may well be that it was the statements in the arguments in those two cases which led to the statement on page 568 of the present edition of Buckley on the Companies Acts (which is a repetition of a statement which first found its place in the tenth edition) that "To give the court jurisdiction to "proceed under this section it is essential (A) That the official "receiver makes a 'further report' under section 236 (2). "*Semble*, therefore, an order for public examination under this "section cannot by virtue of section 307 be made in a voluntary "winding up, nor can such an order be made in a winding up "under supervision (section 315 and Eleventh Schedule)."

The other authorities to which my attention has been directed do not appear to me to affect the matter, and they do not disclose even the establishment of such a practice as might make the court hesitant to invoke section 307 in the present case. Even if they did that but no more, on a question of jurisdiction the matter would have to depend in the end upon the interpretation of the language of the statute and not upon any practice which might have grown up. When one turns to section 307, one finds language which on the face of it is perfectly clear, and which is wide and unfettered by any context to be found in the section: "The liquidator or any contributory or creditor may "apply to the court to determine any question arising in the "winding up of a company, or to exercise, as respects the

---

[6] [1894] 1 Ch. 444, 446.

"enforcing of calls or any other matter, all or any of the powers "which the court might exercise if the company were being "wound up by the court."

In view of that wide language, it appears to me, with respect, that the reasoning of Evershed M.R. ought to be followed. Reverting to the passage in which he was considering the reasoning underlying the judgment of Roxburgh J., he said[7]: "As I have already indicated, it seems to me that if Parliament "states that powers vested in the court in a compulsory winding "up shall be available on application in a voluntary winding up, "it cannot have been supposed that steps would have been taken "in a voluntary winding up which would only arise, and which "could only have been taken, in a compulsory winding up." And I further respectfully agree with him that that reasoning must apply to section 307 no less than in the case of section 334. Therefore, when one turns to section 270, although it appears on the face of it that it is only to apply in the case of a compulsory winding up, it must also be applicable in a winding up if the court should exercise the power conferred upon it by section 307. The second condition in the section, namely, "and the official "receiver has made a further report," is a condition the existence of which, by the reasoning of Evershed M.R., must be confined to the case where there is a compulsory winding up. If the court desires to make an order under section 307 it cannot be any bar to that order that if the liquidation had been a compulsory liquidation there would have to have been a further report.

This result may be thought curious when one considers that in the case of an application for a public examination in a compulsory liquidation a number of steps have to be taken in order to ensure that a step undoubtedly so serious is not taken except in proper circumstances, and so as to ensure a certain amount of security or protection to the individual whose examination is asked for, and who in the nature of things has played no part in the proceedings leading up to the making of the order. But although such a consideration may pass through one's mind in construing the provision relating to the making of an order for a public examination in a compulsory liquidation, yet, where one finds the legislature in such clear terms as the language of section 307 giving this wide power, it becomes impossible to cut that language down merely because a complete procedure may not be found to be laid down if that section is invoked in a voluntary liquidation for the purpose of obtaining an order for a public examination. I think myself, on consideration, that the difficulty is not one of any substance, because in the case of an application for an order for a public examination there is the overriding safeguard—that the report on which the application is based must be considered by the judge personally; and quite obviously when the court decides under section 307 to exercise the power under section 270 in a voluntary liquidation it must be furnished with the necessary material for considering whether or not the serious step should be taken of ordering a public examination.

---

[7] [1953] Ch. 488, 496.

For those reasons, applying the reasoning of Evershed M.R., which, as I have said, I regard as binding upon me, but with which also I respectfully agree, I propose on this motion merely to discharge the order of the registrar, so that the matter may go back to him with a view to the next step being taken—that I shall be furnished with the report upon which the application for the public examination of the director in question is based.

The costs of this application will be costs in the liquidation.

Order of registrar discharged.
Summons remitted to chambers.

Solicitors: *Clifford-Turner & Co.*

F. R. D.

C. A.
1953
Dec. 7, 8.
Evershed M.R., Jenkins and Morris L.JJ.

In re SPENSLEY'S WILL TRUSTS.
BARCLAYS BANK LD. *v.* STAUGHTON AND OTHERS.

[1951 S. No. 317.]

Charity—Bequest of a residence for the High Commissioner of Australia —Provision for renunciation of primary trust at any future date—Alternative trust "for such other uses preferably . . . in connexion "with Australia as the . . . National Trust and my sister . . . may "jointly decide . . ."—Perpetuity rule—No general charitable intent.

Perpetuity rule. "Renunciation at any future date." Will.

A testator by clause 14 of his will devised a house and lands to the National Trust upon trust, after the prior life interests of his sisters, "for the use of the High Commissioner or other person representing the Government of the Commonwealth of Australia in

"England for the time being to be used by him as a country residence "in a way similar to that in which Chequers is used by the Prime "Minister of England. Should the Government of the Common-"wealth of Australia refuse this bequest at the time of my death "or renounce it at any future date then for such other uses "preferably for some purpose in connexion with Australia as the "said National Trust and my sister . . . if then alive may jointly "decide or if" that sister "be not then alive as the said National "Trust may decide." The testator died in 1938, and in the same year the High Commissioner for the Commonwealth of Australia by deed renounced the trust and the National Trust disclaimed the trusteeship. On a summons taken out by one of the trustees of the will asking, inter alia, whether the trusts had failed or were valid charitable trusts, Vaisey J. held that they were valid. On appeal by beneficiaries interested in the testator's residuary estate:—

Held, (1) that the primary trust in favour of the High Commissioner of Australia was not a valid charitable trust;

(2) that, on the true construction of the will, the Government of Australia could renounce the benefit of the primary trust after accepting it and enjoying it for any period; that the primary trust accordingly might take effect and continue for a period longer than that permitted by the rule against perpetuities and then fail, with the consequence that the alternative trust was invalid as infringing the rule against perpetuities, even if it could be upheld as a valid charitable trust;

(3) that where there was a gift to a holder of an office of a charitable character virtute officii with merely superadded words conferring wide powers of disposition, on the principle applied in *In re Flinn* [1948] Ch. 241; 64 T.L.R. 203; [1948] 1 All E.R. 541, the gift would prima facie be charitable by virtue of the charitable character of the office; but where the gift was to a trustee bearing a charitable character or holding a charitable office upon trusts which, according to their terms, were not, or were not exclusively or necessarily, of a charitable nature, the scope of the trust was not limited by reference to the character of the trustee. In the present case, the alternative gift could not properly be upheld as charitable on the ground of the appointment of the National Trust as trustee of the gift, and accordingly the alternative trust failed to qualify as a valid charitable trust.

In re Flinn, supra, distinguished, and the observations of Lord Macnaghten in *Dunne* v. *Byrne* [1912] A.C. 407, 409; 28 T.L.R. 257 and of Sir Wilfred Greene M.R. in *In re Ashton* [1938] Ch. 482, 494; 54 T.L.R. 491; [1938] 1 All E.R. 707 considered and applied.

Decision of Vaisey J. [1952] Ch. 886; [1952] 1 T.L.R. 1435; [1952] 2 All E.R. 49 reversed.

APPEAL from Vaisey J.

The testator, Howard Spensley, by clause 14 of his will dated March 24, 1932, provided: "I devise and bequeath my land "houses and buildings in the parishes of Westoning Harlington

" and Tingrith in the County of Bedford (except as herein other-" wise dealt with) including the lordship of the manor of " Westoning and the advowson of the living of Westoning herein-" after called the estate of Westoning to the National Trust for " Places of Historic or Natural Beauty of 7 Buckingham Palace " Gardens Westminster (hereinafter called the National Trust) " upon the following trusts: (1) For my sister Ethel Fairchild " for life; (2) After the death of the said Ethel Fairchild for my " sister Tassie Mary Skene for life; (3) After the death of both " of my said sisters for the use of the High Commissioner or " other person representing the Government of the Common-" wealth of Australia in England for the time being to be used " by him as a country residence in a way similar to that in which " Chequers is used by the Prime Minister of England. Should " the Government of the Commonwealth of Australia refuse this " bequest at the time of my death or renounce it at any future " date then for such other uses preferably for some purpose in " connexion with Australia as the said National Trust and my " sister Ethel Fairchild if then alive may jointly decide or if the " said Ethel Fairchild be not then alive as the said National " Trust may decide but so that the said estate of Westoning " may as far as possible be kept intact. The presentation to the " said living of Westoning to be made by the person for the " time being having the use of the said Manor House or if that " be not possible then by the said National Trust. I hope should " the Australian Government accept this bequest they will " appoint to the living of Westoning men having experience in " Australia so that a greater knowledge of the two countries the " one by the other may arise."

There followed a provision in which a sale was recommended of part of the Westoning property, but the testator suggested " that the remainder of the estate be not sold but may as far as " possible be maintained in the state in which it now is that is to " say as a small residential agricultural estate."

Clause 15 of the will provided: " I bequeath the furniture " and contents (other than monies securities or legal documents " and except as herein otherwise disposed) of my manor house " at Westoning to the said National Trust to be used in con-" nexion with the said house and to follow the trusts created " in respect of my Westoning estate."

The testator died on March 3, 1938, and his will was proved on June 8 in the same year by Barclays Bank Ld., the plaintiffs. On July 11, 1938, the National Trust disclaimed the trusteeship.

On September 3, 1938, the High Commissioner for the Commonwealth of Australia by deed renounced and disclaimed the trust for the benefit of the High Commissioner or other person representing the Government of the Commonwealth of Australia in England for the time being (hereinafter referred to as " the " primary trust ").

The plaintiffs, Barclays Bank Ld., one of the trustees of the will, took out this summons asking whether on the true construction of the will, and in the events which had happened, the trusts contained in clauses 14 and 15 of the will concerning the Westoning estate and the contents of the manor house at Westoning, subject to the life interests of the testator's two sisters, had failed or were valid charitable trusts. The summons also raised the question whether a codicil which the testator had made to the will had revoked certain trusts for the benefit of the children of the testator's niece. Vaisey J. held [1]: first, that the trusts in clauses 14 and 15 were valid charitable trusts; secondly, that the codicil in question had only a limited operation.

There were three appeals against Vaisey J.'s decision. In all three appeals beneficiaries interested in the testator's residuary estate appealed against his decision holding that the gift contained in clauses 14 and 15 of the testator's will was a valid charitable gift. The appellants on the first and second appeals also appealed against his decision on the effect of the codicil. These two appeals were, with the leave of the court, compromised. Accordingly, no decision was given on the second matter decided by Vaisey J.

E. Blanshard Stamp for the first, second and third defendants, the appellants on the first appeal, who were concerned primarily with the compromise of the second question decided by Vaisey J., dealt with the compromise of that question which the court was asked to approve.

Nigel Warren for Mrs. Mary Gluckman, the fourth defendant, a beneficiary interested in residue, the appellant on the second appeal. The testator by clause 14 of his will has not created a valid charitable trust. The gift in clause 14 falls into two parts. The primary trust is to establish a kind of minor Chequers for the benefit of the High Commissioner of Australia. That trust is not a valid charitable trust. The testator had in mind the trusts created by the Chequers Estates Act, 1917; but it is clear from the provisions of that Act that a trust of this character is not a valid charitable trust, for the Act was necessary to give legal effect to trusts which were thereby authorized. These trusts which the testator has created resemble those considered in *In re Corelli,*[2] where it was held that a trust to provide accommodation for distinguished foreigners visiting Stratford-upon-Avon was not a valid charitable trust. A trust to strengthen the bonds of amity between this country and Australia would not be a valid charitable trust: *In re Strakosch.*[3] Further, the primary trust is outside the ambit of the powers of the National Trust, since it is not contemplated that the property should be open to the public.

---

[1] [1952] Ch. 886; [1952] 1 T.L.R. 1435; [1952] 2 All E.R. 49.

If the first argument fails, it is submitted that the trust to take effect on the termination of the first trust is not a valid charitable trust. It is conceded that the objects of the National Trust are charitable: *In re Verrall.*[4] It is also conceded that the general principle applied in *In re Garrard,*[5] *In re Norman*[6] and *In re Flinn*[7] is well founded, although it has never been approved by the Court of Appeal. That principle is that where a gift is to a person who holds an office the duties of which are by their nature legally charitable, and the gift is to him in his official character and by virtue of his office, then, if the purposes for which the gift is made are not expressly limited, the gift is construed to be for the charitable purposes inherent in the office. Here the property was not given to the National Trust without more. It was given for such uses as the National Trust and the testator's sister should appoint. The trusts they might appoint are not limited to the purposes for which the National Trust itself is established. These powers include charitable and non-charitable objects and are accordingly bad. The fact that a trustee is a charitable corporation will not of itself make a gift to the trustee charitable, where the trusts declared are not themselves necessarily charitable: *Dunne* v. *Byrne*[8]; *In re Davidson.*[9]

J. A. R. Finlay for the appellant on the third appeal, John Brevent Gluckman. The principle which was applied in *In re Flinn*[10] has no application here, because for that principle to apply there must be a gift such that, if the words conferring a discretion on the donee are taken away, what is left is a valid charitable gift. Here, without the words "then for such other "uses as the National Trust . . . may decide," the gift would be a gift to the National Trust as an express trustee, and not a gift to the National Trust as a charity.

---

[2] [1943] Ch. 332; 59 T.L.R. 437; [1943] 2 All E.R. 519.

[3] [1948] Ch. 37; 63 T.L.R. 577; [1947] 2 All E.R. 607.

[4] [1916] 1 Ch. 100.

[5] [1907] 1 Ch. 382; 23 T.L.R. 256.

[6] [1947] Ch. 349; [1947] 1 All E.R. 400.

[7] [1948] Ch. 241.

[8] [1912] A.C. 407; 28 T.L.R. 257.

[9] [1909] 1 Ch. 567; 24 T.L.R. 760.

[10] [1948] Ch. 241.

The primary trust for the use of the property as a residence for the High Commissioner is not a charitable trust; and so, even if the words "for such other uses as the National Trust . . . may "decide" could be construed as creating a charitable trust, that trust would be void for perpetuity. The ultimate trust "for such "other uses, etc.," is a gift over arising upon the contingency of the Australian Government "refusing or renouncing" the gift in favour of the High Commissioner. The testator makes a distinction between "refusing," which would have to be done at or within a reasonable time of the death, and "renouncing." The will provides that the Australian Government may renounce the gift "at any future date." "Renounce" here means give up or surrender. The renunciation could be made even after the gift had been accepted, and could be made outside the perpetuity period. The ultimate trust is thus contingent upon an event which might happen outside the perpetuity period, and therefore the ultimate trust, even if it is limited to charitable objects, is void for perpetuity as being a gift over from a non-charitable purpose which is not bound to take effect within the perpetuity period.

Denys B. Buckley for the Attorney-General. It is contended first that the primary trust is one for the benefit of the inhabitants of Australia and therefore a valid charitable trust, and that the gift over on the secondary trusts is valid as the substitution of one set of charitable trusts for another. The second trust is a valid charitable trust. This case is covered by *In re Flinn.*[10] It is a gift to a charitable corporation and accordingly the gift is deemed to be held on the charitable trusts on which the National Trust holds property. The fact that the testator's sister is associated with the National Trust in the power to appoint is immaterial. She cannot appoint without the concurrence of the National Trust. After her death, the National Trust will be in a position to appoint the property as they please. This is a case where the character of the trustee colours the trusts. This trustee is a corporation which has no powers outside the charitable trust vested in it by Parliament. Any gift to it must be held on charitable trusts. There are two motives for this gift: first, the

[10] [1948] Ch. 241.

testator's desire to preserve the estate, and, secondly, his desire to preserve the connexion with Australia. These motives are not inconsistent with the use of the property for the charitable purposes for which the National Trust is established. There is nothing in the terms of the second trust which suggests that the testator intended to include non-charitable objects. If the first trust is not a valid charitable trust, that should not be held to affect the construction of the second trust. [Reference was made to *In re Rees*[11] and *In re Ashton.*[12]]

The gift over does not infringe the rule against perpetuities. The Government of Australia must accept this gift within a reasonable time of the death of the last tenant for life. "Renounce" means refusing out and out in the first instance. The Government of Australia could not accept the gift and then at some future time give it up. "Refuse and renounce" are apt to describe the initial refusal of the gift. The appeal should be dismissed.

Hector Hillaby for the trustees.

John Mills and *D. S. Chetwood* appeared for beneficiaries concerned in the appeals which were compromised.

JENKINS L.J. stated the facts and continued:—In view of the renunciation and disclaimer by the High Commissioner, the primary trust (whether it would or would not otherwise have constituted a valid disposition) ceased to have effect by virtue of the express provision in the primary trust which brings the second or alternative trust, as I will call it, into operation in the event of the Government of the Commonwealth of Australia refusing the bequest at the time of the testator's death or renouncing it at any future date.

In these circumstances, the question arose whether the alternative trust which, in the events which happened, so far as it lawfully could, took (subject to the life interests) immediate effect, was a valid charitable trust. By his judgment, May 14, 1952, Vaisey J. held[1] that the alternative trust was a valid disposition for charitable purposes, and from that decision the beneficiaries interested in residue now appeal to this court.

Vaisey J.'s decision[1] was founded upon an application of the principle deducible from certain authorities referred to and followed in *In re Flinn.*[2] In that case, according to the headnote: " A testatrix bequeathed to ' His Eminence the Arch-" ' bishop of Westminster Cathedral London for the time being ' " her residuary estate ' to be used by him for such purposes " ' as he shall in his absolute discretion think fit ' "; and it was held " that the bequest was a gift to him as a trustee and not " beneficially and that he held the residuary estate on a valid " charitable trust for ecclesiastical purposes."

---

[11] [1920] 2 Ch. 59.

[12] [1938] Ch. 482.

[1] [1952] Ch. 886; [1952] 1 T.L.R. 1435; [1952] 2 All E.R. 49.

[2] [1948] Ch. 241; 64 T.L.R. 203; [1948] 1 All E.R. 541.

The reasoning which led the judge to apply the principle deducible from those cases to the case now under consideration was substantially to this effect: starting with the proposition that the National Trust is a corporation established for exclusively charitable purposes, he went on to hold that, although the testator purported to confer on Ethel Fairchild jointly with the National Trust the discretionary power of deciding upon or selecting the uses to which the property was to be put, under the alternative trust the effective selection of such uses was in the hands of the National Trust alone, inasmuch as the property could only be applied to the purposes in question on the death of Ethel Fairchild. He therefore concluded that the gift here, so far as the alternative trust was concerned, was in substance equivalent to a gift to the National Trust to be applied for such purposes as the National Trust might decide, and therefore comparable to a gift of the type considered in *In re Flinn.*[2] In other words, the judge regarded the gift here in question as tantamount to a gift to a corporate body established for exclusively charitable purposes, with a superadded direction to the effect that such charitable body was to apply the property for such purposes as it might think fit; and, so regarding it, held, on the principle deducible from *In re Flinn*[2] and the cases therein cited, that the superadded direction, being merely in general terms which purported to give an unfettered discretion to the charitable body, namely, the National Trust, did not have the effect of enlarging the permitted objects of the gift beyond the charitable purposes which the National Trust itself could properly pursue under its constitution.

The reasoning on which the judge's decision was based has been criticized in this court on behalf of the appellants. To those criticisms I will return later in this judgment, but I should first of all consider a point taken before us which, so far as I am aware, was not argued before Vaisey J., and it was this: it is, of course, well known that trusts for charitable purposes are exempt from the rule against perpetuities, that being one of the important privileges or advantages accorded to charity by the courts. Nevertheless, a gift to charity, unless it takes effect on the failure or determination of a previous gift to charity, must take effect, if at all, within the period allowed by the rule against perpetuities.

---

[2] [1948] Ch. 241.

Applying that principle to the present case, the appellants contend that the primary trust in this case was not a charitable trust, so that on any view there is no appropriation of the fund to charity by the terms of this disposition until the failure or determination of the primary trust. They further point out that the primary trust is limited to endure until such time as the bequest may be refused or renounced by the Government of the Commonwealth of Australia, as appears from the words: "Should the Government of the Commonwealth of Australia "refuse this bequest at the time of my death or renounce it at "any future date then for such other uses . . ." They contend that this provision is apt to cover the case of a renunciation by the Government of the Commonwealth of Australia at any future time, not necessarily a time falling within the period permitted by the rule. They therefore submit that the alternative trust, even if it could otherwise be upheld as a charitable trust, is a trust which, according to the terms of the will, might take effect beyond perpetuity limits and accordingly, even if it could otherwise be held to be charitable, is void as infringing the rule.

Mr. Buckley, for the Attorney-General, contested that argument substantially on these grounds: first, he said that the primary trust was a charitable trust and therefore one had here an immediate appropriation to charitable purposes, and the exemption applied to a gift at any distance of time from one charitable object to another. Secondly, he said that the words "Should "the Government of the Commonwealth of Australia refuse this "bequest at the time of my death or renounce it at any future "date" connoted a refusal or renunciation either at the testator's death or within a reasonable time thereafter, and should not be construed as introducing a possibility of a failure of the gift at a time extending beyond the perpetuity period.

As to the latter point, I see no ground in the context for placing that limited construction on the words "or renounce it "at any future date." In my view, the Government of the Commonwealth of Australia could properly be said to renounce this gift within the meaning of the provision in question if, after accepting it and enjoying it for a period, they decided (for whatever reason) that the benefit of the trust should be given up. In

C. A.
1953

Spensley's Will Trusts, *In re.*

Jenkins L.J.

my view, therefore, the provision concerning refusal or renunciation does open the possibility of the primary trust taking effect and continuing for a period longer than that permitted by the rule against perpetuities and then failing, with the consequent taking effect of the alternative trust beyond the permitted limits.

As to the argument that the primary trust is a trust for charitable purposes, Mr. Buckley invited us to draw an analogy between this case and the cases in which trusts have been upheld as conducive to the efficiency of the armed forces of the Crown. He also said, if I understood him correctly, that this trust could be upheld as charitable, as being for the benefit of a section of the community: namely, the citizens of Australia, the cost to whom of maintaining in this country their duly constituted representative would be pro tanto reduced and who would also enjoy the more efficient services of such representative, due to the opportunities for rest and recuperation afforded by the country retreat which the testator was minded to provide.

I find myself unable to accept that argument. It seems to me that this trust is simply a trust to provide certain amenities for a person for the time being holding in this country a particular office under the Australian Government. I think that it would be an unwarrantable extension of the fourth head of "charity" in the classification contained in *Pemsel's* case[3] to hold such a disposition as that to be charitable.

I am fortified in that view by the circumstance that those responsible for framing the Chequers Estate Act, 1917 (7 & 8 Geo. 5, c. 35), clearly regarded the comparable purposes to which Chequers was to be devoted as open to objection, inferentially on the ground of perpetuity, unless validated by Act of Parliament. The deed scheduled to the Act contains this recital: "And whereas "the trusts hereinafter declared in relation to the Chequers "Estate and the said trust fund would infringe certain rules of "law unless these presents were confirmed and made valid by Act "of Parliament and it is intended that a Bill shall be introduced "into Parliament for the confirmation of these presents accord-"ingly"; and, in addition to that, the Act, which confirmed the scheduled document, contains the recital: "And whereas the "trusts created by the said deed cannot take effect without the "authority of Parliament, and it is expedient that the said trusts "should have full force and validity."

I find some further support for my conclusion in the decision of Cohen J. in *In re Corelli.*[4] In that case a testatrix gave the residue of her estate and effects to trustees, "to enclose all the "freehold land at M.C. as a breathing space and air zone for the "health of the town of S., her expressed intention being that the "ultimate trusts of the house and grounds at M.C. be continued "in perpetuity for the benefit and service of distinguished visitors "from far countries visiting S. who would otherwise seek their "quarters in a hotel." Cohen J. held that the purpose comprised in the provision that the house and grounds be continued in perpetuity for the benefit and service of distinguished visitors from far countries visiting S. was not a valid charitable purpose.

---

[3] [1891] A.C. 531; 7 T.L.R. 657.

Accordingly, in the view I take, the object of the primary trust, although no doubt it might be said to be a desirable and useful public object, is not such an object that it can properly be held to be a charitable object within the legal definition of "charity." It follows that, in my judgment, the new point taken in this court should succeed, with the result that the alternative trust is invalid as infringing the rule against perpetuities, even if it could otherwise be upheld as a valid charitable trust.

That conclusion makes it strictly unnecessary to consider the actual ground of the judge's decision; but, in view of the fact that it was the ground upon which the case was decided before him, and in view of the argument presented to us, it is only right that I should proceed to consider it also. Vaisey J. founded himself on the principle deducible from the cases summarized and followed in *In re Flinn.*[5] I find it unnecessary to review those authorities at length, because Mr. Warren, in the course of his argument on behalf of residue, stated the principle deducible from them in terms which, if I may say so, appear to me to be wholly adequate, and from which Mr. Buckley, for the Attorney-General, did not dissent. The principle deducible from those authorities was thus stated by Mr. Warren: "Where there is a gift to a "person who holds an office the duties of which are in their "nature wholly charitable and the gift is made to him in his "official name and by virtue of his office, then, if the purposes "are not expressed in the gift itself, the gift is assumed to be "for the charitable purposes inherent in the office."

On the other hand, it is necessary also to bear in mind the principle stated in such cases as *Dunne* v. *Byrne*[6] and *In re Davidson.*[7] The principle deducible from those cases is of this nature—to contrast it with the principle deducible from *In re Flinn*[8] and the cases there followed it can appropriately be introduced with a " but "—" but where the purposes of a gift " are plainly expressed in terms not confining them to purposes " which are in the legal sense charitable, they cannot be confined " to charitable purposes merely by reference to the character of " the trustee."

---

[4] [1943] Ch. 332; 59 T.L.R. 437; [1943] 2 All E.R. 519.

[5] [1948] Ch. 241.

[6] [1912] A.C. 407; 28 T.L.R. 257.

[7] [1909] 1 Ch. 567; 24 T.L.R. 760.

To quote from Lord Macnaghten's judgment in the Privy Council in *Dunne* v. *Byrne*,[9] Lord Macnaghten said: " The " learned counsel for the appellants began by insisting that " inasmuch as according to the authorities a gift to a Roman " Catholic Archbishop and his successors, without more, would " be a good charitable gift, there is to be found in this will an " overriding charitable intention sufficient to supply the lack of " certainty—if lack of certainty there be—in the declared object " of the bequest. Their Lordships have no hesitation in rejecting " this argument. A similar argument was advanced and rejected " in the Court of Appeal in England in the case of *In re Davidson*.[10] It is difficult to see on what principle a trust expressed " in plain language, whether the words used be sufficient or " insufficient to satisfy the requirements of the law, can be " modified or limited in its scope by reference to the position " or character of the trustee."

It will be seen that inevitably those two principles must be liable to produce fine distinctions in particular cases, and it may often be hard to decide on which side of the line a given case falls. Is it a gift to a holder of an office of a charitable character virtute officii, with merely superadded words conferring wide powers of disposition? If so, on the principle followed in *In re Flinn*,[11] the gift will prima facie be charitable by virtue of the charitable character of the office. On the other hand, is it a gift to a trustee bearing a charitable character or holding a charitable office upon trusts which according to their terms are not, or are not exclusively or necessarily, of a charitable nature? If so, then the scope of the trust is not to be limited by reference to the character of the trustee.

In the present case, speaking for myself, I feel little difficulty in holding that the gift here in question cannot properly be upheld as a charitable gift on the strength of the principle followed in *In re Flinn*.[11] Vaisey J. was able to reach a different conclusion, the nature of which I have already indicated. I should perhaps quote that part of his judgment in which he states his conclusion. He said [12]: " I am bound to say that, applying the principle " explained rather than laid down by Jenkins J. in *In re Flinn*,[13] " it seems to me that I must look at this case as if the person " who has the effective disposing power was the National Trust. " The National Trust is admittedly a charity with certain defined " charitable purposes. That is best to be seen from *In re* " *Verrall*,[14] where it was held, among other things, that the " purposes for which the National Trust had been incorporated " were charitable purposes, and they are expressed by Astbury J. " as being ' plainly public purposes, expressly stated to be for " ' the benefit of the nation. . . .' He went on to say that " they had no choice of applying them to any other purposes. " It is said that the words which I have read, ' preferably for " ' some purpose in connexion with Australia,' must necessarily " exclude any idea of the purposes to which the National Trust " was confined, and in declaring these alternative purposes, " which have to be brought into operation in the events which " have happened, those words preclude the National Trust from " applying the purchase money to the general purposes for which " the National Trust was incorporated. I cannot accept that. " To begin with, the words introduced by the word ' preferably ' " cannot be more than a mere predilection, and I must regard " the National Trust as having, not by way only of property, " but also by way of power, the right to dispose of this property, " which is now represented by the proceeds of sale."

---

[8] [1948] Ch. 241.

[9] [1912] A.C. 407, 409.

[10] [1909] 1 Ch. 567.

[11] [1948] Ch. 241.

Vaisey J. then referred to *In re Garrard* [15] and *In re Norman*,[16] two of the cases mentioned in *In re Flinn*,[17] and expressed the view that the present case went a little further than those cases, but that the judge's decision followed " as a necessary sequel to " those decisions." He said of the present case: " It is not so " simple or straightforward or so clear-cut, but I think that the " National Trust, by virtue not only of this property, but by " virtue of the power which it also has, is given only such control " over this property as enables it to dedicate it to purposes which " are either the same or in pari materia with its own proper " purposes as an incorporated charity."

Before I leave the authorities, it would be right for me to refer

---

[12] [1952] Ch. 886, 890.

[13] [1948] Ch. 241.

[14] [1916] 1 Ch. 100, 115.

[15] [1907] 1 Ch. 382.

[16] [1947] Ch. 349; [1947] 1 All E.R. 400.

[17] [1948] Ch. 241.

C. A.
1953

SPENSLEY'S WILL TRUSTS, *In re.*

Jenkins L.J.

to *In re Ashton*,[18] to which reference was made by Mr. Buckley. *In re Ashton*[18] was the well-known case of a gift to certain vicars and churchwardens "for parish work." The passage to which Mr. Buckley referred was that where Sir Wilfred Greene M.R. said[19]: "I agree that if the words could be construed in "the way in which Mr. Vaisey would have us construe them, "he would be entitled to succeed, but I find myself quite unable "to construe them in that way. First of all, I do not think it "is legitimate to cut down the purposes which are specified by "reference to the character of the trustees. That is a rule that "has been enunciated more than once. The passage in which "it is most frequently quoted is the passage in the judgment of "the Privy Council in *Dunne* v. *Byrne*,[20] delivered by Lord "Macnaghten." Then the Master of the Rolls read the passage in *Dunne* v. *Byrne*[20] to which I have already referred, and continued: "I quite agree that Lord Macnaghten there is "referring to a trust expressed in plain language, and he certainly "did not mean to suggest that the character of the trustee is a "thing which is to be disregarded in construing the gift as a "whole. I can well conceive of cases where the purpose named "takes its colour from the character of the trustee, but where "you find that there is plain language it is not legitimate to cut "that language down by reference to the fact that the trustees "named hold a particular office, or have a particular character."

So here, says Mr. Buckley, there are no trusts declared in plain language: there is merely a general reference to "such "other uses preferably for some purpose in connexion with "Australia, as the said National Trust and my sister Ethel "Fairchild if then alive may jointly decide . . ."; and he says that those words, being vague and colourless in themselves, should be given the proper colour by reference to the character of the National Trust as trustee.

Vaisey J.'s conclusion based on the principle followed in *In re Flinn*[21] is attacked on the part of the residuary legatees substantially on the following grounds: they are, I think, disposed to concede that, if the gift here had been a gift to the National Trust to be applied by the National Trust for such purposes as it might think fit, or upon trust to apply the same for such purposes as the National Trust might think fit, a disposition in those terms might well be a valid disposition for charitable purposes by analogy to the cases of a gift to the holder of some office of a charitable character by virtue of his office; for while pointing out that there is no exact correspondence between a gift to an individual as the holder for the time being of some office and a gift to a corporation aggregate, as in the present case, they are not, as I understand their argument, concerned to dispute the validity, or probable validity, of a gift in the terms I have stated. The burden of their argument is that the actual gift here in question is by no means of that character. They point out that this is not a case where the property is given simply to the National Trust as sole trustee to be applied as the National Trust may think fit: it is a case where the property is given to the National Trust for such uses as the National Trust and the testator's sister, Ethel Fairchild, may jointly decide; and although it may well be that a gift to the National Trust in trust to apply the same for such purposes as the National Trust should think fit would be a valid charitable gift, on the ground that the superadded words should not enlarge the National Trust's power of disposition beyond the purposes necessarily charitable which it can properly pursue under its constitution, there can be no ground for the same conclusion in the case of a gift to the National Trust jointly with an individual, on trust to apply the same for such purposes as they (the two trustees) may think fit, or in the case of a gift (as the gift here actually is) to the National Trust for such uses as the National Trust and a named individual may jointly decide. They say that in such a case no inference can be drawn from the character of the trustee as regards the nature or scope of the trusts to which the joint power of selection extends. They criticize Vaisey J.'s conclusion as having been reached by the unjustifiable process of treating the discretion conferred for the purposes of the alternative trust, as a discretion reposed in the National Trust alone. It is, of course, true that, after the death of Ethel Fairchild, the National Trust, if they had accepted the trust, would have been left in sole control; but it is impossible to ignore the fact that the power of selection of objects is in the first instance undoubtedly given to Ethel Fairchild and the National Trust jointly, and the testator quite clearly contemplated that, in certain circumstances, Ethel Fairchild would play an active and effective part in making the selection.

---

[18] [1938] Ch. 482; 54 T.L.R. 491; [1938] 1 All E.R. 707.

[19] [1938] Ch. 494.

[20] [1912] A.C. 407, 410.

[21] [1948] Ch. 241.

Criticism does not end there, for it is also said that the primary trust is not a trust for charitable purposes. With that

C. A.
1953

SPENSLEY'S WILL TRUSTS, *In re.*

Jenkins L.J.

contention I agree, for the reasons I have already endeavoured to state. The primary trust not being charitable, it is asked, with force, what ground can there be for restricting the uses to which the power of selection extends, expressed as they are in the most general terms, to charitable uses?

Further, it is pointed out that the primary trust, whether it was charitable or not, was not a trust of a kind falling within the charitable purposes for which the National Trust was constituted. We were referred to the National Trust Acts, but, for my part, I have seen nothing in them to justify the conclusion that it would be a legitimate object of the National Trust to maintain a country residence for the High Commissioner for Australia for the time being. One therefore finds in the primary trust that the testator contemplates that the National Trust will act as a trustee for the purposes of a trust not falling within the charitable objects of its constitution; and again it is asked, with force: if that be so, what justification is there for drawing the inference that the other uses to which the property is to be applied under the alternative trust should be uses falling exclusively within the authorized charitable objects of the National Trust?

Then it is said that the preference expressed in the words "preferably for some purpose in connexion with Australia" shows that the testator had in mind objects by no means necessarily within the scope of the National Trust's legitimate objects; and, although Vaisey J. was not impressed with this argument, it seems to me to be not without force.

I do not think that any further light is thrown on the question by clause 15 of the will, which contains the gift of the furniture. The gift there is to the National Trust without any mention of the joint power of selection, but it is a referential gift, and I cannot regard the omission as affording any real support for Vaisey J.'s conclusion.

I think that I have now considered substantially all the arguments directed against the validity of the alternative trust, and, for my part, I find them unanswerable. Mr. Buckley has persuasively argued the contrary. He says that the alternative trust is wholly separate and distinct from the primary trust, and that here one finds objects expressed in vague and general terms which should be construed by reference to the fact that the National Trust is the trustee, and by that process limited to charitable purposes within the scope of the legitimate objects of the National Trust. For my part I cannot find in clause 14 any indication sufficient to justify controlling and limiting the purposes of the alternative trust in that way, and, in the view I take, on this ground also, as well as the ground of perpetuity dealt with above, the alternative trust fails to qualify as a valid charitable trust, with the consequence that the property comprised in the disposition in question is not validly disposed of and must sink into residue.

Accordingly, I would allow this appeal.

EVERSHED M.R. I am of the same opinion; and only for the reason that we are differing from Vaisey J. (with what hesitation, upon a matter of this kind, I need not say) I add some few observations of my own.

The law which has to be applied is not, I think, in doubt. Mr. Warren stated it in terms which Mr. Buckley was content to accept and which Jenkins L.J. has quoted. To that statement I only venture to add, in reference to the cases of *Dunne* v. *Byrne* [22] and *In re Davidson*,[23] a short statement from the argument of Mr. Stranders in *In re Flinn* [24]: " a gift, which is otherwise not charitable, does not become charitable through its being given to a corporation which occupies a charitable office."

My Lord has also quoted from Sir Wilfred Greene M.R.'s judgment in *In re Ashton*.[25] I cannot say in this case, obviously, that we have here " plain language "; but if, for the words " plain language " in his statement, I substitute " language having upon its true construction the effect of comprehending non-charitable objects," then the passage in *In re Ashton* [25] is applicable here. The problem in this case (as in all cases) is in the end to construe properly the language which the testator has used and to discern therefrom whether or no he has expressed what is called a general charitable intention.

I am of opinion (and, I confess, clearly of opinion) that what my Lord has called the primary trust—that is, the first trust in favour of the High Commissioner for the Commonwealth of Australia—is not a charitable gift. That view was not, as Mr. Buckley said, argued below and he has, I think, argued it perhaps a little faintly here; but, however that may be, the suggestion that it is charitable as tending to promote the public interest of the diplomatic service of the Commonwealth of

---

[22] [1912] A.C. 407.

[23] [1909] 1 Ch. 567.

[24] [1948] Ch. 241, 243.

[25] [1938] Ch. 482, 494.

C. A.
1953

SPENSLEY'S WILL TRUSTS, *In re.*

Evershed M.R.

Australia seems to me too spectral and remote. The object is to provide a commodious and appropriate country residence for the amenity of the holder of the office of the High Commissioner for Australia, and I cannot think that, however laudable and desirable, to be a charitable object.

If that be a correct view of what has been called the primary trust, the result is of great importance, in my judgment, although it is not conclusive. It is of great importance because of the point raised by Mr. Finlay, upon which I share the view expressed by Jenkins L.J., namely, that the charitable trust which follows, if it be charitable, may not take effect until a time beyond the period allowed by the rule against perpetuities.

Mr. Buckley asked us to construe the word "renounce" in the phrase "or renounce it at any future date" as having the technical significance of the word when used in reference, say, to a legacy, meaning, renounce it altogether before ever it has been in any respect enjoyed. I do not take that view of the meaning of the word in this context. The phrase is "should "the Government of the Commonwealth of Australia refuse this "bequest at the time of my death or renounce it at any future "date"; and it is to be borne in mind that the opportunity of enjoying this gift may arise immediately (if, for example, the prior life tenant surrendered) or at some distant date after the death of one or both of them. In such a context, and having regard to the dictionary use of the word "renounce," it seems to me that the testator was saying, "should the Commonwealth "at any time, and whether it has in the meantime taken under "the benefit or not, give up or surrender its beneficial interest."

That, as my brother has said, is sufficient to determine the appeal; but on the second point, upon which Vaisey J. took a different view, I also share Jenkins L.J.'s conclusion. Again my conclusion on the effect of the primary or first trust appears to me of great importance, and for this reason. If the disposition for the High Commissioner's benefit is not charitable, then I start with this, that the National Trust, who are appointed trustees of these premises, are directed to hold them for a purpose which is both outside the defined objects for which the trust exists according to the National Trust Acts, 1907 and 1937, and is also non-charitable; and if that is right, then to my mind the real basis of Mr. Buckley's argument is at once destroyed; for, if the trust is from the start a trust which is, or at least may be, foreign to the inherent charitable nature which the National

Trust Acts imposed upon the National Trust, then it seems to me that, in the absence of some very clear words indicating a change of intention, the same view must be applicable to the remainder (the vital part, for this purpose) of the gift. I can find nothing in the later language which has so limiting an effect. The first words, " for such other uses " (and I agree that they mean all uses other than the one already specified) are perfectly general in effect. Similarly the words " preferably for some " purpose in connexion with Australia " (like the words " for " parish work " in the *Ashton* case [26]) provide a formula obviously apt to comprehend purposes other than charitable, although they may also include charitable purposes.

I will not repeat what my brother has said as to the significance of joining the testator's sister Mrs. Fairchild as nominator of the purpose with the National Trust. I agree with him as to the inference to be drawn from that circumstance. Looking at the whole clause and deriving from it, viewed as a whole, the sense which lay behind the testator's expression, I am for my part much impressed by this: the testator opens with a disposition (which I am now assuming is not charitable) in favour of the Australian High Commissioner in England. He then makes a direction for designating a trust prima facie quite unlimited in character, and with the qualification that it is " preferably for some purpose in connexion with Australia." Finally, he directs that as regards presentation to the living of Westoning persons should be appointed " having experience in " Australia so that a greater knowledge of the two countries the " one by the other may arise." Laudable, plainly, as that object is, it seems to me that it is an object which may be described more appropriately by the word (used in its proper and general sense) " political " than " charitable." It is an expression of an intention analogous, as I think, to the intention which this court held to underlie the disposition in *In re Strakosch.*[27]

For these reasons, in addition to those which my brother has stated and with which I find myself in full agreement, I think, as he does, that the intention to be derived from this part of the will is not a charitable intention; and I think, therefore, that this appeal must be allowed and that the gift, which is here in question, must be declared invalid.

---

[26] [1938] Ch. 482.

[27] [1948] Ch. 37; 63 T.L.R. 577; [1947] 2 All E.R. 607.

C. A.
1953

SPENSLEY'S WILL TRUSTS, *In re.*

MORRIS L.J. I find myself in full agreement with the two judgments which have been delivered, and I do not desire to add anything.

Appeal allowed.

Solicitors: *Radcliffes & Co.; Leman, Harrison & Flegg; Treasury Solicitor.*

B. A. B.

1954
Jan. 15.

Upjohn J.

In re KOETTGEN'S WILL TRUSTS.
WESTMINSTER BANK LD. *v.* FAMILY WELFARE ASSOCIATION TRUSTEES LD. AND OTHERS.

[1953 K. No. 686.]

Charity—Will—Bequest for "commercial education"—Advancement of education—Primary trust of public nature—Direction to prefer members of limited class—Validity.

A testatrix bequeathed her residuary estate on trust "for the "promotion and furtherance of commercial education . . ." The will provided that "The persons eligible as beneficiaries under the "fund shall be persons of either sex who are British born subjects "and who are desirous of educating themselves or obtaining tuition "for a higher commercial career but whose means are insufficient or "will not allow of their obtaining such education or tuition at their "own expense . . ."

She further directed that in selecting the beneficiaries "it is my "wish that the . . . trustees shall give a preference to any employees "of J. B. & Co. (London) Ld. or any members of the families "of such employees; failing a sufficient number of beneficiaries "under such description then the persons eligible shall be any "persons of British birth as the . . . trustees may select Provided "that the total income to be available for benefiting the preferred "beneficiaries shall not in any one year be more than 75 per cent. "of the total available income for that year."

In the event of the failure of those trusts there was a gift over to a named charity. It was admitted that the trust was for the advancement of education, but it was contended for the charity that having regard to the direction to prefer a limited class of persons the trusts were not of a sufficiently public nature to constitute valid charitable trusts:—

Held, that the gift to the primary class from whom the trustees could select beneficiaries contained the necessary element of benefit to the public, and that it was when that class was ascertained that the validity of the trust had to be determined; so that the subsequent direction to prefer, as to 75 per cent. of the income, a limited class did not affect the validity of the trust, which was accordingly a valid and effective charitable trust.

Oppenheim v. *Tobacco Securities Trust Co. Ld.* [1951] A.C. 297; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31 distinguished.

ADJOURNED SUMMONS.

By her will, dated September 20, 1946, Lyra Adolphina Emmy Koettgen settled her residuary estate on certain trusts therein declared.

Clause 7 of her will provided: " I declare that my residuary " trust fund shall be held by my trustees as a fund for the promotion and furtherance of commercial education according to the " scheme hereinafter set out and that such fund shall be known " as the ' Gustav Adolph and Ernest Koettgen Memorial Fund.' "

Clause 8 provided: " In the administration of the said trust " fund the following rules shall apply:—(a) The income received " in any year after payment of necessary expenses incurred by " my trustees in connexion with the fund shall be paid to the " Charity Organization Society Trustees Ld. hereinafter called " ' The Charity Trustees ' and used by the Charity Trustees for " the purpose of assisting any persons of the description hereinafter designated to educate themselves or to obtain tuition or " experience to fit them for a higher or more successful commercial career than they might otherwise attain." Subclause (b) provided for the accumulation and investment of income not used by the Charity Trustees in any one year, and for its use by them in future years.

Clause 8 further provided: " (c) The expression ' commercial " ' education ' shall mean the training of any persons for a " successful commercial career and shall include education in " or for all or any of the following subjects videlicet shorthand " typewriting banking Stock Exchange routine bookkeeping the " custom and practice of merchants factors and brokers commercial law (both British and foreign) foreign languages with " special preference to such languages as are at the time considered of most value to an international commercial career " political and commercial economics technical and applied " sciences or any other branch of study which may be deemed " necessary or beneficial in any of the branches of commerce. " (d) The persons eligible as beneficiaries under the fund shall " be persons of either sex who are British born subjects and " who are desirous of educating themselves or obtaining tuition " for a higher commercial career but whose means are insufficient " or will not allow of their obtaining such education or tuition

1954

KOETTGEN'S WILL TRUSTS, *In re.*

"at their own expense; in selecting beneficiaries it is my wish "that the Charity Trustees shall give a preference to any "employees of John Batt & Co. (London) Ld. or any members "of the families of such employees; failing a sufficient number "of beneficiaries under such description then the persons eligible "shall be any persons of British birth as the Charity Trustees "may select.

"Provided that the total income to be available for benefiting "the preferred beneficiaries shall not in any one year be more "than 75 per cent. of the total available income for that year ". . . (i) If the trust set out should wholly fail or it should "become impossible to use the income for the purposes herein-"before indicated my trustees shall stand possessed of my "residuary trust fund for the King Edward's Fund for Hospitals "in London."

The evidence of the chairman of John Batt & Co. (London) Ld. was that the business was established in 1802 as exporters and importers of general merchandise, the principal part of their business being export to foreign countries. The company did not manufacture any commodities, and its staff, now 36 in number, both male and female, were engaged in clerical activities. Having regard to the firm's foreign connexions a knowledge of foreign languages by its staff was considered an advantage. There was no evidence as to the number of persons constituting the families of the company's employees.

The father of the testatrix, Gustav Adolph Koettgen, became chairman for life of the present company which acquired the firm of John Batt & Co. in 1901. The testatrix was a director of the company from 1917 until the death of her father in 1924 when she became chairman, and remained chairman until 1933.

She died on September 13, 1952, and her residuary estate after payment of debts and death duties amounted to some £40,000. The body designated in her will as the Charity Organization Society Trustees Ld. changed their name by special resolution in 1952 to the Family Welfare Association Trustees Ld.

The trustees of the will took out this summons for determination of the question whether the trusts declared in clause 8 of the will were valid and effective charitable trusts or whether they failed or were held on trust for King Edward's Fund for Hospitals in London.

T. A. C. Burgess for the trustees.

G. D. Johnston for the Family Welfare Association Trustees Ld. This is a trust for the advancement of education, and accordingly a valid charitable trust. A trust for "commercial "education," particularly having regard to the definition in the will of that expression, is a proper charitable purpose. [Reference was made to *In re Berridge.*[1]] It is not suggested that this is a trust for relief of poverty merely because it is for the education of persons whose means would otherwise have been inadequate; such persons might not have been actually in need. This must be a trust for education or it is not a charitable trust at all.

The qualification of persons to participate in this fund, i.e., that they must be British born and of insufficient means for obtaining such education, constitutes a sufficient element of public benefit. The direction that 75 per cent. of the income should be applied for the employees of John Batt & Co. and members of their families is merely a direction as to the manner in which the testatrix wished that part of the income to be applied. If there are not sufficient persons from that limited class the whole of the income would be available for persons fulfilling the first qualification. It is not a limitation of the class of persons who could take under this gift, as in *In re Compton* [2] and *Oppenheim* v. *Tobacco Securities Trust Co. Ld.*[3]

Hector Hillaby for the King Edward's Fund for Hospitals in London. It is admitted that this is a trust for the advancement of education, and it is conceded that as to 25 per cent. of the income it is a valid charitable trust; but it is not, as to 75 per cent. of the income, of a sufficiently public nature to constitute a valid charitable trust. The direction restricting the application of that part of the income to the employees of John Batt & Co. and members of their families is an imperative direction which limits the class of beneficiaries who can take. A trust for the benefit of particular individuals cannot be a valid charitable trust: *In re Compton* [4] and *In re Scarisbrick.*[5] This restriction as to 75 per cent. of the income means, on the authority of *Oppenheim* v. *Tobacco Securities Trust Co. Ld.*,[6] that the application of that part of the income lacks a sufficient element of public benefit to constitute a valid charitable trust. It is only if that preferred class should fail that the wider class can come in.

---

[1] (1890) 63 L.T. 470.

[2] [1945] Ch. 123; 61 T.L.R. 167; [1945] 1 All E.R. 198.

[3] [1951] A.C. 297; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31.

[4] [1945] Ch. 123.

[5] [1951] Ch. 622; [1951] 1 T.L.R. 989; [1951] 1 All E.R. 822.

[6] [1951] A.C. 297.

Denys Buckley for the Attorney-General. There is a distinction between this case and *In re Compton* [7] and *Oppenheim* v. *Tobacco Securities Trust Co. Ld.*[8]; in those cases it was necessary to come within the limited class of beneficiaries to be eligible at all, but that is not so in the present case, where the persons eligible are derived from a class which clearly contains the necessary degree of public benefit. It is only at the second stage that there is a direction that, out of that primary class, a selection has to be made as to part of the income, but that does not invalidate the trust once the validity of the primary class has been established.

The test of validity must be decided when the class of eligible beneficiaries is ascertained, and once that class is established the subsequent direction, as to 75 per cent. of the income, to prefer certain persons out of that primary class does not affect its validity: *In re Compton.*[9]

UPJOHN J., having stated the facts: The whole question which I have to decide is whether or not the trust declared in clause 8 is a valid charitable bequest. Before doing that I will refer very shortly to the evidence relating to the history of John Batt & Co. (London) Ld. which is contained in the affidavit of the present chairman of the company.

[His Lordship referred to the evidence as above set out and continued:] The evidence is inconclusive as to whether there would be sufficient eligible employees of this company and members of their families to take up to 75 per cent. of the annual income from this trust fund. They might be in some years, and in others they might not.

Certain admissions were very properly made by counsel in the course of their argument. Mr. Johnston, for the first defendants, admitted that he could not argue that the gift, by reason of the term in the will which provided that persons eligible must be of insufficient means to obtain such education, was for the relief of poverty; he admitted that the trust, to be charitable, must be for the advancement of education.

On the other hand Mr. Hillaby admitted that the term "commercial education" in the will was a proper charitable purpose, in the sense that it was a trust for the advancement of education. He confined his attack on the validity of the trust to the contents of subclause (d) of clause 8, saying that

---

[7] [1945] Ch. 123.

[8] [1951] A.C. 297.

[9] [1945] Ch. 123, 129.

that clause contained a trust for the employees of John Batt & Co. (London) Ld. and members of their families, and that it would be consistent with recent authorities to hold that this provision as to 75 per cent. of the income of the trust fund did not have the requisite degree of public benefit. He did not challenge the validity of the remaining 25 per cent. That, which is the whole question that I have to determine, is a question of construction of the will of the testatrix.

Mr. Hillaby's argument was that the trust, as to 75 per cent. of the income, was primarily for the benefit of the employees of John Batt & Co. and their families, and that it was only if there were insufficient employees or members of their families that the public could come in as beneficiaries under the trust. He contended that the words "in selecting beneficiaries it is my wish "that the charity trustees shall give a preference . . ." must be read in an imperative sense (I agree with that contention), and that it was only when that preferred class failed that members of the public could benefit.

There is much force in that argument, but on the whole I do not think that it is the true construction of this clause. The matter must be approached by asking the question: who are eligible under the will? They must be "persons of either sex who "are British born subjects and who are desirous of educating "themselves or obtaining tuition for a higher commercial career "but whose means are insufficient or will not allow of their "obtaining such education or tuition at their own expense . . ." That is the primary class.

If the will concluded there, the trust would clearly be a valid charitable trust, having regard to the admission that a gift for commercial education is for the advancement of education.

The next task is to make a selection from that primary class of eligible persons. At that stage there is a positive direction to give a preference to the employees of John Batt & Co. and members of their families. In some years there might be sufficient members of such limited class to fill the 75 per cent. available for them, and in other years there might not be. The evidence, as I have said, is inconclusive on this point. The time may come when John Batt & Co. (London) Ld. ceases to carry on business, and in that event the income of the whole trust fund must be applied for the benefit of the primary class which fulfils qualifications contained in subclause (d).

It is only when one comes to make a selection from that primary class that the employees of John Batt & Co. and the members of their families come into consideration, and the question is, does that direction as to selection invalidate the primary trust? In my judgment it does not do so.

I was referred to *In re Compton*[1]; *Oppenheim* v. *Tobacco Securities Trust Co. Ld.*[2] and *In re Scarisbrick.*[3] I propose to refer only to the summary of the law in the judgment of Jenkins L.J. in the last-mentioned case, where he said[4]: "(i) It is a general "rule that a trust or gift in order to be charitable in the legal "sense must be for the benefit of the public or some section of the "public: see *In re Compton*,[5] *In re Hobourn Aero Components* "*Ld.'s Air Raid Distress Fund*[6] and *Gilmour* v. *Coats.*[7] (ii) An "aggregate of individuals ascertained by reference to some per-"sonal tie (e.g., of blood or contract), such as the relations of a "particular individual, the members of a particular family, the "employees of a particular firm, the members of a particular "association, does not amount to the public or a section thereof "for the purposes of the general rule: see *In re Drummond*,[8] *In* "*re Compton*,[9] *In re Hobourn Aero Component Ld.'s Air Raid* "*Distress Fund*,[10] and *Oppenheim* v. *Tobacco Securities Trust* "*Co. Ld.*[11] (iii) It follows that according to the general rule above "stated a trust or gift under which the beneficiaries or potential "beneficiaries are confined [that is an important word] to some "aggregate of individuals ascertained as above is not legally "charitable even though its purposes are such that it would have "been legally charitable if the range of potential beneficiaries "had extended to the public at large or a section thereof (e.g., "an educational trust confined as in *In re Compton*,[12] to the "lawful descendants of three named persons, or as in *Oppenheim* "v. *Tobacco Securities Trust Co. Ld.*,[13] to the children of "employees or former employees of a particular company)."

In my judgment it is at the stage when the primary class of eligible persons is ascertained that the question of the public nature of the trust arises and falls to be decided, and it seems to me that the will satisfies that requirement and that the trust is of a sufficiently public nature.

---

[1] [1945] Ch. 123; 61 T.L.R. 167; [1945] 1 All E.R. 198.

[2] [1951] A.C. 297; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31.

[3] [1951] Ch. 622; [1951] 1 T.L.R. 989; [1951] 1 All E.R. 822.

[4] [1951] Ch. 622, 648.

[5] [1945] Ch. 123.

[6] [1946] Ch. 194; 62 T.L.R. 313; [1946] 1 All E.R. 501.

[7] [1949] A.C. 426; 65 T.L.R. 234; [1949] 1 All E.R. 848.

[8] [1914] 2 Ch. 90; 30 T.L.R. 429.

[9] [1945] Ch. 123.

[10] [1946] Ch. 194.

[11] [1951] A.C. 297.

[12] [1945] Ch. 123.

[13] [1951] A.C. 297.

1954

Koettgen's Will Trusts, In re.

Upjohn J.

If, when selecting from that primary class the trustees are directed to give a preference to the employees of the company and members of their families, that cannot affect the validity of the primary trust, it being quite uncertain whether such persons will exhaust in any year 75 per cent. of the trust fund. On the true construction of this will, that is not (as to 75 per cent.) primarily a trust for persons connected with John Batt & Co., and the class of person to benefit is not "confined" to them, and in my judgment the trust contained in clauses 7 and 8 of the will of the testatrix is a valid charitable trust.

Declaration accordingly.

Solicitors: *Roche, Son & Neale for Shepheards & Bingley, Kensington; Lovell, Son & Pitfield; E. F. Turner & Sons; Treasury Solicitor.*

I. G. R. M.

In re ALLEN, DECD.
FAITH *v.* ALLEN AND OTHERS (No. 2).

1954
Feb. 9.

Harman J.

[1952 A. No. 1301.]

Will—Construction—Date of ascertainment of qualification—Devise to eldest son "who shall be a member of the Church of England "and an adherent to the doctrine of that Church"—Previous life interests.

A testator devised certain freehold property to his nephew Frederick absolutely. By a codicil to his will he cut down that devise by providing that if Frederick died leaving no son surviving him, the property should pass successively to Frederick's wife Elizabeth, and his younger brother Francis for their lives, and from and after the death of Francis "to the eldest of the sons of the said "Francis . . . who shall be a member of the Church of England and "an adherent to the doctrine of that Church. . . . In case there "shall be no son of the said Francis . . . who shall be a member of "the Church of England and an adherent to the doctrines of that "Church, then on the death of the said Francis I devise and "bequeath the said dwelling-house . . . to my cousin. . . ."

The testator died in 1908, Francis died in 1932, Frederick died in 1941 without a son, and Elizabeth, the last tenant for life, died in 1952. Francis had three sons, other than one specifically excluded by the will, two of whom predeceased Elizabeth. The sons were all baptized in the Church of England, but they had been brought up

1954

ALLEN, DECD., *In re.* FAITH *v.* ALLEN (No. 2).

as Roman Catholics; one son was a Roman Catholic at all material times, and the evidence was that the two remaining sons, including the only son still living, might have reverted to the Church of England.

The qualification in the codicil was held by the Court of Appeal not to be void for uncertainty: *In re Allen, Faith* v. *Allen* [1953] Ch. 810; [1953] 2 All E.R. 898.

On a summons to ascertain on what date the qualification in the codicil was to be determined:—

Held, that the material date was that of the death of the last tenant for life in 1952, when the property would vest in possession in a remainderman qualified under the terms of the will, as the context indicated that the property was to pass to a member of the Church of England, and not to the personal representatives of an individual who had at some previous time fulfilled that qualification.

Bartleman v. *Murchison* (1831) 2 Russ. & M. 136 applied.

ADJOURNED SUMMONS.

Henry George Allen, by his will dated November 4, 1906, devised his freehold dwelling-house "Paskeston" to his sister Isabella for her life "if she should prefer to live there to her "present or any other residence." Subject to that provision, he devised the dwelling-house to his nephew Frederick Seymour Allen and his heirs absolutely.

By the third codicil to his will, dated November 10, 1907, the testator cut down the gift to Frederick by the following provision: ". . . if the said Frederick shall die leaving no son him surviving, "then I give and devise the said dwelling-house . . . to his "wife . . . Elizabeth during her life or until any marriage by her "to any second husband and upon her death or second marriage "I give and devise the said dwelling-house . . . to my nephew ". . . Francis S. Allen during his life and from and after his death "to the eldest of the sons of the said Francis (except his son "Hugh) who shall be a member of the Church of England and "an adherent to the doctrine of that Church. . . . In case there "shall be no son of the said Francis (other than the said Hugh) "who shall be a member of the Church of England and an "adherent to the doctrines of that Church, then, on the death of "the said Francis, I devise and bequeath the said dwelling-house ". . . to my cousin Judge Wilfred Allen and his heirs."

The testator, who was a bachelor, died on November 25, 1908. His sister Isabella did not exercise her right to live in the house "Paskeston." The testator's nephew Frederick died on August 31, 1941, without leaving any son surviving him. His wife Elizabeth did not remarry and she died on September 8, 1952.

The younger nephew Francis died in 1932; he had three sons (other than the son Hugh referred to in the codicil), Guy who died in 1923, Reginald who died in 1940, and Evelyn who was now living in Canada. The evidence was that all the sons were baptized in the Church of England; but that they were brought up as Roman Catholics, their mother being a Roman Catholic. The son Guy was at all material times a Roman Catholic. The son Reginald was a Roman Catholic at the date of the death of the testator, but there were some grounds for believing that he might have reverted to the Church of England at the date of the death of his father Francis. It appeared likely that the son Evelyn, who was the youngest of these three sons, was a Roman Catholic at the date of the death of the testator, but there was no evidence whether or not he subsequently rejoined the Church of England.

The condition relating to the qualification of the eldest son of Francis to take "Paskeston" was held by the Court of Appeal (*In re Allen, Faith* v. *Allen*)[1] not to be void for uncertainty.

The present question on the summons was to determine on what date this qualification was to be ascertained.

R. O. Wilberforce for the plaintiff, a trustee of the will.

J. P. Hunter-Brown for the personal representatives of the deceased son Reginald. The four possible dates are: (a) 1908, the date of the testator's death; (b) 1932, the date of the death of Francis; (c) 1941, the date of the death of Frederick; and (d) 1952, the date of the death of Elizabeth. They should be placed in this order of precedence: (c), (b), (d), (a).

Until Frederick died it was always possible that he might have a son, in which case no son of Francis would ever have an opportunity to qualify. But on Frederick's death it became certain that the gift over would take effect if any son of Francis could qualify, the class of possible claimants having already closed with the death of Francis.

Alternatively, the date should be that of the death of Francis, when the class closed.

At the date of Elizabeth's death the son Reginald had himself died, but there is evidence to suggest that he fulfilled the qualification at the time of his death. If so, he had attained a vested interest, and as the codicil contains no words of survivorship the interest should not be divested.

---

[1] [1953] Ch. 810; [1953] 2 All E.R. 898.

The testator could not have intended the date to be that of his own death, for it is apparent that his purpose was to re-convert the sons of Francis from the Roman Catholic Church to the Church of England.

Hubert Rose for the son Evelyn. The material date to possess the qualification in the codicil is either 1952, the date of Elizabeth's death, or 1932, the date of the death of Francis. On the construction of this codicil as a whole, it is apparent that the testator desired that his property should be inherited by a person who was a member of the Church of England; that could only be determined in 1952 when, on the death of Elizabeth, the property would vest in possession. That construction is supported by *Bartleman* v. *Murchison,*[2] where it was said that a court of equity would apply the principle that a person to whom a legacy was given in a particular character and by a particular description should only be entitled to it if he were "clothed with that "character, and answered that description" at the moment when the legacy vested in possession.

Alternatively, if 1952 be not the right date, it should be 1932, the date of the death of Francis. That event was considered by the testator as a material date; it is mentioned twice in the will and, if no one fulfilled the qualification in the codicil, the gift over was expressed to take effect "on the death of . . . Francis." At that date the number of persons who were eligible crystallized, as there could be no other sons of Francis, and the persons from whom the selection would be made was then known.

N. P. M. Elles for the personal representatives of Judge Allen. The correct date is 1908, the date of the death of the testator. There is nothing in the codicil which requires the person who qualifies to survive beyond the death of the testator until the vesting in possession. Prima facie, the will speaks from death, and the testator meant by this codicil the eldest son of Francis who at his (the testator's) death should be a member of the Church of England. He only intended that a son of Francis who died in his lifetime should be excluded: see *Home* v. *Pillans* [3] and *Schenk* v. *Agnew.*[4] All the sons of Francis were Roman Catholics at the date of the testator's death; the gift over to Judge Allen and his heirs should in the circumstances be held effective.

---

[2] (1831) 2 Russ. & M. 136.

[3] (1833) 2 My. & K. 15.

[4] (1858) 4 K. & John. 405.

HARMAN J., having stated the facts: This question concerns a bequest already much canvassed in these courts, which forms the subject-matter of the decision of the Court of Appeal in *In re Allen.*[1]

Inquiry is to be made as to what sons of Francis Allen satisfy the qualification of being " a member of the Church of England " and an adherent to the doctrine of that church," but as a preliminary to that inquiry the present question is raised as to the date at which it is to be ascertained whether a son of Francis has this qualification.

At the date when the testator made his will the wife of his nephew Francis had become a Roman Catholic, and it appears that all her children were being brought up in that religion. There is no evidence whether the testator knew that or not, but it is not a circumstance which can be left out of account altogether in the consideration of a will drawn in this form.

Four dates are suggested. First of all, it is said that the death of the testator is the right date, and that is put on the strong ground that there is nothing in this will to suggest the necessity of surviving further. The gifts to the children of Francis all remain contingent until the death of Frederick, because, if he had a son, that son would take to the exclusion of his younger brother Francis. It is argued that there is no reason why the son of Francis who qualifies need survive any date at all beyond that of the death of the testator, and that the word " shall " is merely a word of futurity in the sense of " shall at my death " be a member." That is a perfectly logical construction.

Secondly, it is said that the material date is that of the death of Francis in 1932, because that event limited the number of candidates as he could have no further sons. The will contains, moreover, a clear reference to the death of Francis which is treated twice as a material date; first, " from and after his death " to the eldest son " who shall be a member of the Church of England; and, secondly, " in case there shall be no son . . . " then on the death of Francis " to the testator's cousin. It is contended that there are strong indications in the will that the time to decide the parting of the ways is the death of Francis when the class of his children closed.

Thirdly, it is argued that the material date is the death of Frederick without issue male, for that is when the interest of the child of Francis, if it ever vested at all, became a vested interest, and ceased to be a contingency.

---

[1] [1953] Ch. 810; [1953] 2 All E.R. 898.

The last date put forward is 1952, the date of the death of the last tenant for life when the interest vested in possession.

It is difficult, as I read the will, to choose any but the first or last of those dates. One must adhere either to the principle that the beneficiary need only survive the testator to fulfil this qualification unless the will provides otherwise, or one must treat this as a qualification in which the material date is the date on which the interest will vest in possession. The other two dates seem to me highly artificial, although 1932 has, as I have pointed out, the force derived from the words "on the "death of . . . Francis"; but, as Mr. Rose argued, those words are only put in because the testator assumed, as most testators do, that everybody would take in due order, an event which commonly does not happen and did not happen here; so that the words "the death of Francis" only mean on the falling in of the last life interest. If it is read as "and on the falling in of "the last life interest to the eldest of the sons of Francis who "shall be a member of the Church of England and an adherent "to the doctrine of that Church," that suggests a living person of whom the trustees can inquire as to the state of his belief both formally and spiritually; that is to say, they must find out whether he is formally a member of the Church by baptism and Communion, and, secondly, whether his adherence to the doctrine of the Church is sincere. It does not seem likely that the testator meant that they were to inquire into the nature of those qualifications in the case of a dead man. The testator intended that a member of the Church of England should inherit this real property, not the representatives of somebody who had been a member of the Church 20 years before. The will, to my mind, points to that construction.

I am to some extent helped to that conclusion by *Bartleman* v. *Murchison*,[2] a case before Lord Brougham L.C., sitting on appeal from the Vice-Chancellor. The will provided: "I give and "bequeath unto my mother, . . . the sum of £100 sterling money "per annum, payable every six months during her natural life and "after her decease to my sister . . . that is to say, if my sister be "a widow, but not otherwise. . . ." The sister was not a widow either at the death of the testator or at the death of the testator's mother; but, having become a widow thereafter, she claimed

---

[2] (1831) 2 Russ. & M. 136.

1954

ALLEN, DECD., *In re.* FAITH *v.* ALLEN (No. 2).

Harman J.

the legacy. Lord Brougham said [3]: " A court of equity will not " presume that a party who is not in esse is intended to take, " unless such an intention be made plain and put beyond dispute " by the words of the will; and it is only following out the same " principle to hold that a person, to whom a legacy is given in " a particular character, and by a particular description, shall " not be entitled to it, unless he be clothed with that character, " and answer that description, at the moment when the legacy " might vest in possession." That is quite a different case, of course—being the case of a widow—but it seems to me that the last words of the Lord Chancellor are pertinent words. When a qualification for the taking of an estate has to be found, one looks naturally for the person who has that qualification when his interest, if any, will vest in possession. In this case that is the death of Elizabeth, the widow of Frederick, in 1952. I propose to hold, therefore, that the material date for this purpose is at or immediately after the death of Elizabeth.

Declaration accordingly.

Solicitors: *Thicknesse & Hull; Robbins, Olivey & Lake for Sampson, Horner & Co., Bradford, Yorks; Hore, Pattisson, Bathurst, Summerhays & Co.*

I. G. R. M.

---

[3] 2 Russ. & M. 140.

In re SANDERS' WILL TRUSTS.
PUBLIC TRUSTEE *v.* McLAREN.

1954

Feb. 24.
Harman J.

[1953 S. No. 3968.]

Charity—Relief of poverty—Working classes—Gift " to provide dwell- " ings for the working classes in the area of P."
Charity—Cy-près doctrine—" General charitable intention "—Express— Ineffective. " Working class."

A testator by the codicil to his will provided that: " My trustee " shall apply one equal third part of my residuary trust fund in " any manner in which he in his absolute discretion considers " to be in furtherance of my general charitable intention with " regard to the disposal thereof, namely, to provide or assist in "providing dwellings for the working classes and their families "resident in the area of Pembroke Dock, Pembrokeshire, Wales, "or within a radius of five miles therefrom (with preference to "actual dockworkers and their families employed at the said docks) "and so that the name of my late wife L. S. may in some way be "perpetuated in connexion with this bequest. Without prejudice "to the generality of my said charitable intention . . . I declare that "my trustee shall have all or any of the following powers in giving "effect to this bequest . . ."; then followed a number of powers, including powers to acquire land, to make applications to the court or to the Charity Commissioners, and to pay money to a charity having similar objects.

On the hearing of a summons taken out to ascertain whether these provisions constituted a good charitable gift for the relief of poverty, or whether they failed for uncertainty:—

Held, (1) that a gift for "the working classes" was not a gift for the relief of poverty, as that expression did not indicate poor persons; observations of Buckley J. in *In re Sutton* [1901] 2 Ch. 640, 646; 17 T.L.R. 703; and of Denning J. in *H. E. Green & Sons* v. *Minister of Health* (*No.* 2) [1948] 1 K.B. 34, at p. 38 applied. *In re Glyn Will Trusts* [1950] W.N. 373; 66 T.L.R. (Pt. 2) 510 distinguished.

(2) That no general charitable intention could be inferred, notwithstanding the testator's express use of that phrase, as it was referable only to the particular non-charitable purpose of erecting houses for the working classes.

ADJOURNED SUMMONS.

The following statement of facts is taken from the judgment: The testator, William Henry Sanders, at the time of his death in 1951 was still in practice as a solicitor at 8, Bloomsbury Square, W., and being on his death-bed was apparently not satisfied with the testamentary provisions he had made. His only next-of-kin was a sister, who was a defendant to this summons. He left a not inconsiderable estate, the residue amounting to some £30,000. Being in extremis he summoned a fellow solicitor, whose office was in the same building, to help him to make his will. On the first day all he did was to leave certain legacies and to give directions as to the sale of his practice. That exhausted him for that day. He made his mark and left the rest, as the evidence showed, for the morrow. On the next day, having given fairly elaborate instructions both orally and by reference to certain documents in his office, he executed the codicil which had given rise to the present question. That was on August 17, 1951. He died on the next day.

The codicil, signed with his mark, after giving one additional pecuniary legacy, devised the residue on the usual administrative

1954

SANDERS' WILL TRUSTS, *In re.* PUBLIC TRUSTEE *v.* MCLAREN.

trusts for sale and directed his trustee to deal with his residuary trust fund on the following trusts: " My trustee shall apply one " equal third part of my residuary trust fund in any manner " which he in his absolute discretion considers to be in further- " ance of my general charitable intention with regard to the " disposal thereof; namely, to provide or to assist in providing " dwellings for the working classes and their families resident in " the area of Pembroke Dock, Pembrokeshire, Wales, or within " a radius of five miles therefrom (with preference to actual dock- " workers and their families employed at the said docks) and so " that the name of my late wife Louisa Sanders may in some way " be perpetuated in connexion with this bequest. Without " prejudice to the generality of my said charitable intention or to " the said absolute discretion of my trustee I declare that my " trustee shall have all or any of the following powers in giving " effect to this bequest: (i) To purchase land for the purpose of " providing dwellings for the said working classes in the said area " or radius in accordance and conformity with the provisions of " the Working Classes Dwellings Act, 1890." That Act, which was evidently known to the testator, was the Act, 53 & 54 Vict. c. 16, and its long title was " To facilitate gifts of land for dwell- " ings for the working classes in populous places." The object of the Act was to provide that not more than five acres of land might be bought for that purpose without involving the purchaser in the difficulties of the Mortmain and Charitable Uses Acts. The reference to that Act in the codicil was a reference to the purchase of land up to five acres thus facilitated.

The will continued: " (ii) To purchase land anywhere in " England or Wales for the purpose of providing dwellings for the " said working classes in the said area or radius and to apply to " the court or the Charity Commissioners for an order sanctioning " the retention or acquisition of such land for actual occupation " for the purpose of a charity to be founded and called the " 'Louisa Sanders Charity' or the 'Louisa Sanders Homes.' " (iii) To apply to the Charity Commissioners or other authority " for any necessary licence in mortmain to acquire or retain land " to provide dwellings for the working classes hereinbefore speci- " fied. (iv) To appoint persons or a corporation to act as local " trustees in administering any such charity or homes and to " clothe them with all requisite or proper powers and to provide " for the removal or substitution of any such local trustees and " to vest in the local trustees for the time being any property " real or personal. (v) To apply to the Charity Commissioners or

1954

SANDERS' WILL TRUSTS, *In re.* PUBLIC TRUSTEE *v.* McLAREN.

"the court for the establishment or approval of a scheme for the "regulation of any such charity. (vi) To vest in the official "trustees of charitable funds the whole or any portion of the said "one third part of my residuary trust fund upon trust for ever "thereafter to apply the income arising therefrom in furtherance "of my said general charitable intention. (vii) If it shall be or "become impracticable in the opinion of my trustee to acquire "or retain land for the purpose of this bequest, to pay over the "whole or any proportion of the capital for the time being comprising the said one third part of my residuary trust fund to "any subsisting charity having for its object or one of its objects "the provision of dwellings for the said working classes in the "said area or radius with a proviso that such charity shall to the "satisfaction of my trustee perpetuate the name of my said late "wife in some manner in connexion with this bequest. (viii) To "delegate to any other proper person persons or corporation all "or any of the powers aforesaid." He then dealt with the other two-thirds of his residuary estate which was to constitute a fund the income of which was to be devoted to poor deserving widows and/or spinsters resident in the Parish of St. Johns, Pembroke Dock, or within five miles therefrom. Then certain qualifications for those widows and spinsters were laid down. That without question was a charitable disposition of two-thirds of his estate.

W. S. Wigglesworth for the plaintiff.

G. M. Parbury for the next-of-kin, the testator's sister. The gift fails for uncertainty, because the expression "the working "classes" has no precise meaning today; the gift is in no way confined to the relief of aged, impotent or poor persons: see *In re Sutton* [1]; *H. E. Green & Sons* v. *Minister of Health* (*No.* 2),[2] and *Belcher* v. *Reading Corporation.*[3] The testator's reference to what he calls his "general charitable intention" does not make this gift charitable, because it is conditioned by his mistaken view that the erection of houses for the "working classes" was charitable. A testator cannot make a non-charitable purpose charitable merely by calling it charitable. The gift shows a special intention, and not a proper general charitable intention.

N. S. Warren (*Denys Buckley* with him) for the Attorney-General. To constitute a charitable gift within the intendment of the statute of Elizabeth I there need be no express reference to poverty if, on the proper construction of the language as a whole, the court can come to the conclusion that the relief of poverty was intended: see *In re Coulthurst*[4]; *In re Dudgeon*,[5] and *In re Lucas*.[6] In *In re Glyn Will Trusts*[7] Danckwerts J. held that a gift for "old women of the working classes of the "age of 60 years or upwards" was a good charitable gift for the relief of poverty. *Williams' Trustees* v. *Inland Revenue Commissioners*[8] shows that the court will always strive to construe a gift as charitable, if possible. It is conceded that two-thirds of the residuary gift is charitable, and it should be inferred that such an intention extended to the whole. The testator used the actual words "general charitable intention," which were considered by Parker J. in his well-known judgment in *In re Wilson*.[9] In the context of this will those words should be construed to have a wider meaning than the reference to the housing of the working classes which followed them.

---

[1] [1901] 2 Ch. 640; 17 T.L.R. 703.

[2] [1948] 1 K.B. 34; [1947] 2 All E.R. 469.

[3] [1950] Ch. 380; [1949] 2 All E.R. 969.

G. M. Parbury replied.

HARMAN J., after stating the facts: The question has been raised whether the disposition of the first one-third is a valid charitable bequest. It seems ironical that in a will so elaborately drawn, and drawn with so much knowledge of the machinery of charitable bequests, with its reference to the Charity Commissioners and the court and a scheme, and so forth, and with the use of the words, one might almost say the magic words, "general "charitable intention," there should, nevertheless, be a question for this court as to whether charity is intended to be benefited. However, the gift immediately confronts the careful reader with this, that he had a certain intention which he called "a "general charitable intention," because one finds these words, "in furtherance of my general charitable intention with regard "to the disposal thereof, namely," and then he says that this intention is to provide "dwellings for the working classes and "their families resident" in this area with preference for dockers.

This gift was primarily upheld before me as being in effect a gift for the relief of poverty. Indeed, I do not think that it was suggested that there was any way in which the gift could be upheld unless there was to be found somewhere in it an indication sufficient to induce the court to find the element of poverty in

---

[4] [1951] Ch. 661; [1951] 1 T.L.R. 651; [1951] 1 All E.R. 774.

[5] (1896) 74 L.T. 613.

[6] [1922] 2 Ch. 52.

[7] [1950] W.N. 373; 66 T.L.R. (Pt. 2) 510; [1950] 2 All E.R. 1150.

[8] [1947] A.C. 447; 63 T.L.R. 352; [1947] 1 All E.R. 573.

[9] [1913] 1 Ch. 314.

1954

SANDERS' WILL TRUSTS, *In re.* PUBLIC TRUSTEE *v.* MCLAREN.

Harman J.

the recipients, who are described as " the working classes and their " families "; not widows nor orphans, nor dependants of persons of the working classes, but persons still working, preferably dockers working in the Pembroke Docks. It is difficult to see how poverty is to be attributed to them.

As long ago as the beginning of the present century Lord Wrenbury, sitting at first instance, in *In re Sutton*,[1] dealing with the well-known Sutton Charity, said at the end of his judgment: " the Act of 1890 "—that is the Working Classes Dwellings Act referred to by the testator in his codicil—" is not an Act dealing " with charitable matters, but is an Act providing for erecting " dwellings for the working classes. Now, the poor need not " necessarily be poor of the class known as the working class, " and many of the working class, as we know, are not poor." So that 50 years ago the law recognized that the working classes and the poor were not synonymous. Although a man might be a member of the working class and poor, the first does not at all connote the second.

It has been pointed out recently by Denning L.J., when sitting at first instance, in *H. E. Green & Sons* v. *Minister of Health* (*No.* 2),[2] that the expression " working classes " is an anachronism and does not really mean anything in these days. " Much has " been said," said the judge, " in this case as to the meaning " of ' working classes.' These words ' working classes,' have " appeared in a number of Acts for the last hundred years. I " have no doubt that in former times it had a meaning which " was reasonably well understood. ' Working classes ' fifty years " ago denoted a class which included men working in the fields " or the factories, in the docks or the mines, on the railways or " the roads, at a weekly wage. The wages of people of that class " were lower than those of most of the other members of the " community, and they were looked upon as a lower class. That " has all now disappeared. The social revolution in the last fifty " years has made the words ' working classes ' quite inappropriate " today. There is no such separate class as the working classes. " The bank clerk or the civil servant, the school teacher or the " cashier, the tradesman or the clergyman, do not earn wages or " salaries higher than the mechanic or the electrician, the fitter " or the mineworker, the bricklayer or the dock labourer. Nor " is there any social distinction between one or the other. No " one of them is of a higher or a lower class. In my opinion the

---

[1] [1901] 2 Ch. 640, 646.

[2] [1948] 1 K.B. 34, 38.

" words ' working classes ' used in the Acts are quite inappropriate " to modern social conditions." Then he went on to point out that they nevertheless appear in the Housing Act, 1936, but it is notable that that solecism, if such it was, was remedied by the Housing Act, 1949, which, by its first schedule, removes the words " working classes," whenever those words appear in the Act of 1936.

In *Belcher* v. *Reading Corporation*[3] the court again had to deal with this expression " the working classes " in a case where certain inhabitants of council houses in Reading sued the Reading Corporation, which had put up the rents of their houses, putting forward various reasons why they should not have their rents raised. That contention was rejected by Romer J., who only in passing glanced at the judgment in *Green's* case.[4] He said this[5]: " As to this I may say that, in the light of modern conditions, " I share the difficulty which Denning L.J. felt and expressed in " *H. E. Green & Sons* v. *Minister of Health* (*No.* 2)[4] with regard " to who does, and who does not, belong to the working classes; " the phrase has a far wider, and far less certain, signification " than it used to possess, and it is to be observed that, possibly " for this reason, it has now been jettisoned from section 85 " by Sch. I to the Housing Act, 1949. In so far as the expres- " sion, the working class, is still capable of definition, there is no " doubt but that it can properly and fairly be applied to the " tenants of the privately owned houses in and near Reading of " which particulars were given in evidence."

The working class, if it means anything, may, I suppose, mean persons who occupy council houses; but there are many privately owned houses of that type or standard, and it may be that " working class " means persons who would occupy such houses if they could get them. I cannot think that the qualification or description of a man as a man who would be anxious to get a council house, if he could, would connote that he was poor. It does not follow at all that poverty is any part of the qualification for getting a house of that type. I do not see that I can infer poverty from the words used.

I was referred by counsel on behalf of the Attorney-General to a number of cases in which, though the word " poverty " was not used, the qualification of poverty was inferred from the general context. Thus in the most recent case, *In re Coulthurst*,[6] the Court of Appeal came to the conclusion that a gift for widows whose financial circumstances made them most deserving of assistance connoted that they were poor widows. Similarly, in *In re Dudgeon*[7] Stirling J. held that the fact that the amount there under discussion was 4s. 0d. a week could be taken to mean that it must be given to a person to whom 4s. 0d. a week would be worth having, and who, therefore, must be a poor person. The same argument was used in *In re Lucas*,[8] which was decided by Russell J.

---

[3] [1950] Ch. 380.

[4] [1948] 1 K.B. 34.

[5] [1950] Ch. 380, 392.

[6] [1951] Ch. 661.

Finally, in the most recent case, *In re Glyn Will Trusts*,[9] Danckwerts J. had to construe the words "for . . . building "free cottages for old women of the working classes of the age "of 60 years or upwards." There the expression "working "classes" again appears, and he construed it merely as meaning persons who had to work for their living, and he came to the conclusion that an old woman who had worked for her living and was over 60 was a person likely to be in straitened circumstances, and, therefore, poor. On that account he held the gift to be a good gift. He also made some observations about aged persons with which I am not concerned here, but the ratio decidendi was that out of old age and working class it might be inferred that poverty was a necessary qualification.

What is there here? Nothing of that kind. These are not old persons; they are not widows. They are merely men working in the docks and their families, and, therefore, I cannot infer any element of poverty here.

The next possibility—because there are always very many possibilities in charity cases—is that which is involved in the proposition that this is a bequest confined to an area, namely, five miles from Pembroke Dock. But it is well settled now that where the purpose is declared, the localization of the gift will not make the gift good as a charitable one. The present Lord Chancellor, giving the leading judgment in *Williams' Trustees* v. *Inland Revenue Commissioners*,[10] said: "It was argued that the "limitation of the purpose to a particular locality was sufficient "to validate the gift, that is to say, though purposes beneficial "to the community might fail, yet purposes beneficial to a "localized section of the community were charitable. That argu"ment was rejected by this House. If the purposes are not "charitable per se, the localization of them will not make them "charitable." In the latter part of his speech he dealt with the difficult case of *Goodman* v. *Mayor* (*etc.*) *of Saltash*,[11] and came to the conclusion that the localization of the gift there, which was said to make it good, did so because the purposes were not specified, and, therefore, the court could read in a purpose within the intendment of the statute of Elizabeth I. But if the purpose be specified, one cannot read it in.

---

[7] 74 L.T. 613.

[8] [1922] 2 Ch. 52.

[9] (1950) 66 T.L.R. (Pt. 2) 510.

[10] [1947] A.C. 447, 456.

Lastly, it was said that this testator has evinced a general charitable intention. As I said earlier, it is ironical to think that this general charitable intention has many times been implied, though not expressed, but where expressed may well fail because it is shown by the very fact of being expressed not to have the meaning which the testator perhaps intended to put upon it. I cannot doubt that being a solicitor he knew perfectly well what a general charitable intention is. It is an overriding intention to devote the estate to charity in general. No doubt there may be tacked on to that a particular indication of the form of benefaction intended, and if that fails the general charitable intention will remain. That emerges from the classic passage in the judgment of Lord Parker in *In re Wilson*.[12] But does this bequest in fact impose a general intention overriding the particular charitable intention which he indicates with so much care? The Attorney-General's argument on this part of the case came, if anything, to this; that there was an inference to be drawn from those words of an intention to relieve poverty among persons in this locality. So the head of the whiting joins the tail, if I may say so; and it came back to the same thing in the end, namely, that there was some context here out of which some intention to relieve poverty can be spelt. I can find no such intention. It seems to me on the express words which he has used that he has made this gift for a particular purpose. No doubt in his view that purpose was charitable. In one sense he showed a general intention; his trustees were left a discretion, and the directions which he gave with such particularity were expressed to be "without prejudice "to the generality" of their discretion, but that discretion was limited to the purpose expressed, which turns out, as I think it does, not to be charitable. On this reasoning the fact that he describes it as general, when on its face it is particular, does not seem to me to be of any avail. I cannot infer the intention to relieve poverty, impotence, or old age from the word "general" as used by the testator in this codicil. It follows that this gift of one-

---

[11] (1882) 7 App.Cas. 633.

[12] [1913] 1 Ch. 314, 321.

1954

SANDERS' WILL TRUSTS, *In re.* PUBLIC TRUSTEE *v.* McLAREN.

third of his estate fails because the purpose is not within the statute of Elizabeth I, and, therefore, not charitable.

Declaration accordingly

Solicitors: *Whitelock & Storr; Treasury Solicitor.*

F. R. D.

1954
Jan. 20, 26.

Harman J.

BARCLAYS BANK LD. *v.* BIRD.

[1953 B. 3560.]

Husband and Wife—Property—Matrimonial home—Desertion by husband—Mortgage—Equitable mortgage of matrimonial home by husband—Power of attorney to mortgagee to execute legal mortgage—Desertion by husband—Wife remaining in matrimonial home—Execution of legal mortgage pursuant to power of attorney—Effect—Whether mortgagee's right to possession subject to right of wife to remain in matrimonial home—Order under Married Women's Property Act, 1882, *s.* 17*—Husband not to interfere with wife's possession—Validity of exercise of power of attorney.*

Mortgage—Matrimonial home—Enforcement—Order for possession—When order should take effect. Power of Attorney—Irrevocable.

A mortgagor created an equitable MORTGAGE ~~charge~~ over a dwelling-house by a document under seal, which contained a clause whereby the mortgagor gave an irrevocable power of attorney to the mortgagee to execute a legal mortgage. At the time of the creation of the equitable charge the mortgagor was living with his wife in the mortgaged property, the matrimonial home. Subsequently, the mortgagor deserted his wife, whereupon she obtained an order under section 17 of the Married Women's Property Act, 1882, allowing her to reside in the house. The order forbade the mortgagor, without leave of the court, from taking any step whatsoever which would interfere with the wife's residence in the house. Subsequently, the mortgagor was adjudicated bankrupt, whereupon the mortgagee, by virtue of the power of attorney, executed a legal charge on the property and thereafter claimed possession.

The wife resisted the mortgagee's claim to possession on the grounds (a) that at the date of desertion the mortgagee had only an equitable charge and not a legal charge over the property; (b) that the exercise of the power of attorney by the execution of the legal charge was an infraction of the terms of the order:—

Held, (1) that any equity which the wife might have by virtue of her right to remain in the matrimonial home after desertion by

---

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

her husband was an equity which arose at a time subsequent to the equity vested in the mortgagee by virtue of the equitable charge, and that accordingly it ranked after it;

(2) that, in any event, for the purpose of seeking possession from the court under the terms of a mortgage, an equitable mortgagee was in precisely the same position as a legal mortgagee, and that, accordingly, *Lloyds Bank* v. *Trustee of the Property of O., a Bankrupt* [1953] 1 W.L.R. 1460; [1953] 2 All E.R. 1443 applied;

(3) that the exercise of the power of attorney by the mortgagee was not an infraction of the terms of the order, for the mortgagee had an absolute right to execute that power, and the order restraining the donor of the power could not without notice affect its exercise by the donee.

Tingley v. *Müller* [1917] 2 Ch. 144; 33 T.L.R. 369 applied.

Procedure summons.

By a memorandum of deposit of title deeds, dated February 10, 1947, Joseph William Bird, as beneficial owner, created an equitable ~~charge~~ MORTGAGE over a freehold dwelling-house, No. 38, Crownhill Road, Woodford Bridge, Essex, where he was then living with his wife, in favour of Barclays Bank Ld. to secure repayment of a sum of money, and there was an undertaking to pay on demand. By clause 3 the borrower, as beneficial owner, charged the property with the payment and discharge of all the moneys and liabilities due or to become due under the document, and covenanted to execute and deliver a legal and formal mortgage or registered charge on the property in such form as the bank should elect. By clause 8 the mortgagor irrevocably appointed such one of the bank's local directors or managers as it should designate to be his attorney for executing the legal mortgage or registered charge specified in clause 3.

In December, 1952, the mortgagor deserted his wife, who had since continued to live in the matrimonial home with the two children of the marriage. In January, 1953, the wife obtained a justices' order for maintenance, and on March 11, 1953, she obtained an order in the Queen's Bench Division, under section 17 of the Married Women's Property Act, 1882, allowing her and the two children to reside in the matrimonial home until further order. The order further provided that the mortgagor "without leave of "the court do take no steps by sale or assignment of any right "title or interest which he now has in the said property or by "any act whatsoever create any right title or interest in any other "person to evict his wife and children or any of them from the "matrimonial home or in any way interfere with their residence "therein."

On April 8, 1953, a receiving order in bankruptcy was made against the mortgagor. On April 17, 1953, the bank demanded payment of the moneys due under the equitable charge. On May 6, 1953, the mortgagor was adjudicated bankrupt. On July 7, 1953, the bank exercised or purported to exercise the rights given to it under clause 8 of the deed of February 10, 1947, by appointing one of its local managers to be the attorney of the bankrupt to execute a legal mortgage. On July 9, 1953, the attorney executed in the name of the bankrupt a legal charge upon the property in the bank's favour.

By this summons the bank sought possession of the premises.

J. A. Plowman for the plaintiff bank. The bank is entitled to an order for possession on the principle of *Lloyds Bank* v. *Trustee of the Property of O., a Bankrupt.*[1] The only difference between that case and the present case is that here the bank had an equitable mortgage and not a legal mortgage at the date of the desertion of the wife, when her rights to remain in possession arose. It is submitted, however, that that is not a material difference because the bank's right to have a legal mortgage executed in its favour, by virtue of the terms of the memorandum, preceded any order allowing the wife to remain in possession of the matrimonial home. In any event, the wife's rights are at most an equity and, accordingly, that equity having arisen at a time subsequent to the equity vested in the bank by virtue of the equitable mortgage, it ranks after it. Further, the bank's right to possession was inchoate in the equitable mortgage and, therefore, the fact that the legal mortgage was executed after the date of the desertion is irrelevant; accordingly, the wife's equity is not binding against the mortgagee, the bank.

P. E. Whitworth, for the trustee of the property of the bankrupt mortgagor, did not oppose the application.

J. L. Arnold for the wife. *Lloyds Bank* v. *O.'s Trustee*[1] is distinguishable. At the date of the desertion the mortgagee bank had no legal estate but only an equity under its equitable mortgage, and an equitable mortgagee has no right to possession; his primary remedy is foreclosure: see *per* North J. in *Garfitt* v. *Allen.*[2] Accordingly, since the bank only acquired a right to possession by virtue of the legal mortgage executed after the date of the desertion of the wife, her right to possession which then arose was prior in time to that of the bank.

---

[1] [1953] 1 W.L.R. 1460; [1953] All E.R. 1443.

[2] (1887) 37 Ch.D. 48, 50.

The bank, in support of its contention that its right to possession was inchoate from the time of the creation of the equitable mortgage, has relied on the irrevocable power of attorney conferred by the memorandum. But between the date of the creation of the equitable mortgage and the execution of the legal mortgage two events supervened: (*a*) the wife was deserted by her husband; (*b*) the making of the order in the Queen's Bench Division on March 11, 1953, which admittedly was not binding on the bank. It follows that if it be correct that the bank's right to possession was exercisable under the legal mortgage, but was inchoate from the date of the equitable mortgage, the action of the husband, albeit by his attorney, in executing the legal mortgage was to create a right which enabled the wife to be evicted. But that would amount to a flagrant breach of the terms of the court order, and it is submitted that the bank for this purpose is in no better position than the husband. If there be a doctrine that a person can do some act, by virtue of the exercise of an irrevocable power, contrary to the terms of a subsequent order of a court, then it should be supported by some authority.

A wife, who has been deserted by her husband, has a right to remain in possession of the matrimonial home, and the husband is powerless to affect that right except by a sale to a purchaser who is unaware of and takes without notice of the wife's rights: *Thompson* v. *Earthy*[3]; *Bendall* v. *McWhirter*[4]; *Ferris* v. *Weaven*.[5] The last cited case is strongly relied on in support of the proposition that, once a husband has deserted his wife, he cannot defeat her right to remain in the matrimonial home and, therefore, he cannot so act as to qualify it; but if he does so act, and that act is in favour of a bona fide purchaser for value without notice, the purchaser takes free from the wife's rights. In the present case, however, the bank was not a purchaser, and it is submitted that it had constructive notice of the wife's rights under the principle of *Hunt* v. *Luck*,[6] but not actual notice because her rights were not registrable under the Land Charges Act, 1925, and therefore section 198 of the Law of Property Act, 1925, does not apply. [Reference was also made to *Ex parte Bignold*[7] and *Vaughan* v. *Vaughan*.[8]]

Plowman in reply. The bank was not a party to the order of the Queen's Bench Division, and accordingly it is not bound by its terms. Further, the bank in executing the legal mortgage was not exceeding its authority but was acting under the terms of an irrevocable power of attorney. In so acting the bank was not in any way the servant or agent of the mortgagor but was acting absolutely independently: see *per* Lawrence L.J. in *Tingley* v. *Müller.*[9] It is emphasized that the *right* to possession of the matrimonial home arose under the terms of the memorandum, although it is admitted that the remedy could only be exercised after the execution of the legal mortgage.

---

[3] [1951] 2 K.B. 596; [1951] 2 T.L.R. 82; [1951] 2 All E.R. 235.

[4] [1952] 2 Q.B. 466; [1952] 1 T.L.R. 1332; [1952] 1 All E.R. 1307.

[5] [1952] 2 All E.R. 233.

[6] [1902] 1 Ch. 428; 18 T.L.R. 265.

[7] (1832) 2 Deac. & Ch. 398.

[8] [1953] 1 Q.B. 762; [1953] 1 W.L.R. 236; [1953] 1 All E.R. 209.

HARMAN J. This summons raises once more a question, much canvassed in recent times, of the position of the deserted wife in the matrimonial home. It is the law now—and, of course, I accept it—that there are circumstances in which a wife who has been deserted by her husband can assert the right or privilege of remaining in the matrimonial home. Had the matter been res integra I should have preferred to look on her in that situation as being in what I may call "a status of irremovability" vis-à-vis her husband: that phrase was coined by Lush J. in *Keeves* v. *Dean*[1] to describe the analogous position of tenants so called under the Rent Restrictions Acts who have no estate or interest in the land. That status can be explained because the husband cannot sue his wife in tort, as Goddard L.J. pointed out in *Bramwell* v. *Bramwell.*[2] The principle has recently been held by the Court of Appeal in *Bendall* v. *McWhirter*[3] to hold good against the trustee in bankruptcy of the husband. That decision can be and was upheld on the footing that the trustee takes the property of the bankrupt, but subject to all the bankrupt's disabilities and liabilities. As the husband could not procure the wife's removal by action but only under the Married Women's Property Act, so the trustee was in no better position; indeed, he was worse off, because he could not apply under that Act. It was stated in the course of the judgments in *Bendall* v. *McWhirter*[3] that the wife has something in the nature of a licence to remain in the house, but this was obiter dictum.

It has since been held by Jones J. in *Ferris* v. *Weaven*[4] that the wife's status of irremovability extends to a purchaser from a husband, but not to a purchaser in good faith. The purchaser in that case was the brother-in-law of the husband who, knowing the husband's difficulties and in order to oblige him, purchased the house from him for £30 as part of a scheme to recover possession from the wife in order that the husband might sell the house with vacant possession to his advantage. It was not unnatural that the judge should hold that such a person could not be in a better position than the husband. I do not think that the law has yet gone further than that.

---

[9] [1917] 2 Ch. 144; 33 T.L.R. 369.

[1] [1924] 1 K.B. 685, 686; 40 T.L.R. 211.

[2] [1942] 1 K.B. 370; 58 T.L.R. 148; [1942] 1 All E.R. 137.

[3] [1952] 2 Q.B. 466; [1952] 1 T.L.R. 1332; [1952] 1 All E.R. 1307.

[4] [1952] 2 All E.R. 233.

In a recent decision, *Lloyds Bank* v. *Trustee of the Property of O., a Bankrupt*,[5] Upjohn J. decided that the wife's right or privilege did not hold good against a person having a legal mortgage created before the date when the desertion occurred. A much larger claim was there made for the wife, on whose behalf it was contended that her right, whatever it be called, arises directly after she and her husband go into a house as their matrimonial home but only becomes effective upon a rift or desertion occurring. The judge rejected that submission as fantastic. It does seem to me that any extension of this privilege may in the end prove detrimental to the public interest, because money will not be lent to men who have houses in case they should thereafter turn out to have a deserted wife, or should thereafter desert their wives, and so deprive their creditors of their security. That would be an extremely bad thing for the public in general.

That decision of Upjohn J. I, of course, would follow in this court, but the case now before me is said to be different and, indeed, is different.

[His Lordship stated the facts and continued:] The bank, by this summons, claims possession of the property. There is no resistance to that demand by either the bankrupt or his trustee. But the wife claims to be entitled in priority to the bank to the possession of the property. The difference between this case and *Lloyds Bank* v. *O.'s Trustee*[5] is merely this: that at the date of the desertion when the wife's rights, whatever they be, arose, the bank as mortgagee had no legal estate; and it is contended that as an equitable mortgagee has no right to possession, that not being his remedy, the wife's right to possession arose before the bank's right to possession, the latter right having arisen only on the execution of the legal mortgage.

---

[5] [1953] 1 W.L.R. 1460; [1953] 2 All E.R. 1443, sub nom. *Lloyds Bank* v. *Oliver's Trustee*.

It is also objected on behalf of the wife that the bank by using the power of attorney and executing the legal mortgage on July 9, 1953, in the husband's name have, albeit unknowingly—as it is admitted—flouted the order made under the Married Women's Property Act, 1882, which restrains the husband from creating any interest that might be in priority to that of the wife. Therefore, it is said that the bank cannot have possession because of the wife's privilege, which prevails over the bank's rights. In my judgment, there is no legal justification for that view. The bank had, long before the wife's rights arose, an equitable mortgage which gave it all the rights of equitable mortgagees. It was entitled, therefore, as any other equitable mortgagee is entitled, to come to the court and take out a summons asking for possession. It does not matter from that point of view that the mortgage is equitable. The only limitation on an equitable mortgagee in that respect is that he has no right to possession until the court gives it to him. An equitable mortgagee could always apply to the court to foreclose and appoint a receiver of the rents and profits. Indeed, the practice of the Court of Chancery, as it appears back to the time of Lord Eldon L.C., at least, was to allow an equitable mortgagee to have the rents and profits from the date of the petition, and not merely from the date of the decree of foreclosure. That appears from *Ex parte Bignold.*[6] It is to be observed, moreover, that at the present time it is no objection to proceedings by originating summons by an equitable mortgagee that possession is asked for alone, and not as part of the more elaborate relief of foreclosure, though that used to be said to be an objection: *Wallis* v. *Griffiths.*[7]

Therefore, the bank, having these rights as from the time when the document of February 10, 1947, was executed, had an equity which, in my opinion, must come before the equity, if one should so style it, of the wife. Qui prior est tempore, potior est jure.

It is true that the bank had not the legal estate when the wife's right arose, but it had a right to create it in itself without any interference by the mortgagor, who, at the time when the legal mortgage was executed, had no estate, right, title or interest in this property. If I were to hold that the wife's rights were inchoate, existing at an earlier date, the result might be different; but in that respect I follow Upjohn J.'s decision in *Lloyds Bank*

---

[6] (1832) 2 Deac. & Ch. 398.

[7] [1921] 2 Ch. 301.

v. *O.'s Trustee.*[8] I need not refer in detail to the judgment in that case, nor go into the authorities which are there fully discussed.

As to the second point, namely, that the exercise of the rights under the power of attorney was in some way an infraction of the order under the Married Women's Property Act, 1882, I cannot take that view at all. The bank had an absolute right to do what it did, and an order made restraining the donor of the power of attorney from creating rights could not, in my judgment, without notice affect the donee in any way.

That view is supported by *Tingley* v. *Müller.*[9] The point there, as shortly stated in the headnote, was this: "An irrevocable power of attorney to sell land and give receipts for the purchase-money is not avoided by the donor of the power subsequently becoming an alien enemy." That decision, therefore, is only analogous to the present; but Warrington L.J. made a general observation in his judgment which I find helpful[10]: "Again, a recognized mode of dealing with land is through an attorney acting under a power of attorney. If such a power is made irrevocable, as is the case with that of May 20, 1915,"—and the present power—"then, in favour of a purchaser, not only can it not be revoked in the ordinary sense, but any act done by the donee within the limits of the authority conferred by the power will be as valid as if anything done by the donor of the power without the concurrence of the donee had not been done." There follows a reference to section 9 of the Conveyancing Act, 1882, which section has been repeated totidem verbis by section 127 of the Law of Property Act, 1925. "The attorney under such a power is not like an ordinary agent. As between him and a purchaser he is, so long as he does not exceed his authority, absolutely independent of the principal. He has no occasion to consult or confer with him, and he need pay no attention to any directions he may give. The attorney, in fact, when dealing with a purchaser, is exclusively clothed with all the capacities of the principal in reference to the subject-matter." He was considering in that passage the position of a purchaser; but it seems to me that the passage dealing with the quality and nature of a power of attorney of this sort is in every way applicable to the present case. Accordingly, in my judgment, the creation of the legal charge, which was merely a piece of machinery designed

---

[8] [1953] 1 W.L.R. 1460.

[9] [1917] 2 Ch. 144; 33 T.L.R. 369.

[10] Ibid. 165.

1954

BARCLAYS BANK LD. v. BIRD.

Harman J.

no doubt to enable the bank conveniently to make a title for sale, is not something which I should frown upon as being an infraction of the order of the Queen's Bench Division. In fact, I rest my decision on this, that the equitable mortgagee under a document of this sort is in precisely as good a position as under a legal mortgage when it comes to asking for possession from the court, and it makes no difference—and it is no valid distinction between *Lloyds Bank* v. *O.'s Trustee*,[11] and the present case—that at the date of the desertion the mortgage was equitable and not legal. It seems to me, therefore, that the mortgagee as of right ought to have an order for possession.

It was suggested to me that, if that were so, it was a case in which a long interval, or at least a time longer than the usual interval, ought to be given before the order takes effect, to enable the wife to find other accommodation. I was referred to *Vaughan* v. *Vaughan* [12] on that point. That was a case between husband and wife. This is a case between mortgagee and mortgagor, therefore, those considerations do not apply. If I were to vary the order it would only be, in my judgment, a case of "hard cases "making bad law," and I do not propose in this instance to give way to my natural feelings of sympathy for the wife and children, but to make the ordinary order, which is that possession shall be given 28 days after the service of the order. No doubt the bank may prove more sympathetic than any court feels that it is entitled to be. There will be an order for possession in the common form.

Order accordingly.

Solicitors: *Forbes & Son; J. E. Baring & Co.; Hunt & Hunt.*

---

[11] [1953] 1 W.L.R. 1460.

[12] [1953] 1 Q.B. 762; [1953] 1 W.L.R. 236; [1953] 1 All E.R. 209.

WOODWARD *v.* EARL OF DUDLEY.

1954
Feb. 10.

Danckwerts J.

[1953 W. No. 4153.]

Agriculture—Agricultural holding—Notice to quit—Validity—Reference to part only of land—Joint tenancy—Tenant dying within three months—"Tenant" including tenants—Interpretation Act, 1889 (52 *&* 53 *Vict. c.* 63), *s.* 1—*Agricultural Holdings Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *s.* 24 (1) (2) (*g*).

Landlord and Tenant—Statute—Construction—Singular including plural—Joint ownership.

The provision in subsection (1) of section 24 of the Agricultural Holdings Act, 1948, that a notice to quit an agricultural holding requires the consent of the Minister is subject to the exception, inter alia, in subsection (2) (*g*), where "the tenant with whom the con-"tract of tenancy was made had died within three months before "the date of the giving of the notice to quit, and it is stated in the "notice that it is given" for that reason.

An agricultural holding was let to the plaintiff's father and grandfather as joint tenants by a memorandum of agreement dated September 24, 1928. The father died on May 13, 1948, and the grandfather died on December 17, 1952. The plaintiff was the sole executor of the grandfather's will. On February 5, 1953, the landlord served a notice to quit on the plaintiff, which, on the face of it, referred to part only of the property comprised in the agreement of 1928. The notice concluded: "The reason for giving this notice "to quit is as follows: The said E. C. W. [the father] died some "years ago and the said C. W. [the grandfather] died on December "17, 1952."

The plaintiff contended that the notice was invalid because: (1) it referred to part only of the property comprised in the tenancy, and (2) the word "tenant" in section 24 (2) (*g*) of the Agricultural Holdings Act, 1948, included the plural, and as both the tenants had not died within three months of the notice being given, it was ineffective:—

Held, that the plaintiff succeeded on both contentions and the notice was accordingly ineffective.

In re Bebington's Tenancy [1921] 1 Ch. 559; 37 T.L.R. 409 followed.

ADJOURNED SUMMONS.

By a memorandum of agreement, dated September 24, 1928, and made between Edward Henry Loyd, the predecessor in title of the defendant, as landlord, and Charles Woodward and Ernest Charles Woodward, who were respectively the grandfather and father of the plaintiff, as tenants, the landlord agreed to let and the tenants agreed to take the property described as "the "messuage buildings and enclosures of land known as Jeffries

"Farm situate in the Parishes of Abbots Langley and Kings "Langley in the County of Hertford containing eighty-seven acres "two roods thirteen perches (little more or less) more particularly "described in the First Schedule hereto and the enclosures of "land formerly part of the farm known as Langley Lodge Farm "situate in the said Parish of Kings Langley containing forty-five "acres (little more or less) more particularly described in the "Second Schedule hereto," subject to certain exceptions not here material.

The first schedule referred to Jeffries Farm, Kings Langley, and contained a statement of the various fields which aggregated 87 acres, 2 roods, 13 perches. The second schedule contained a reference to two fields "or part of Langley Lodge Farm" aggregating 45 acres. In the aggregate, the tenancy was created in regard to 132 acres, 2 roods and 13 perches of land; it was a tenancy for a year and then from year to year.

The plaintiff's father died on May 13, 1948, and his grandfather died on December 17, 1952. The plaintiff obtained probate of his grandfather's will, of which he was the sole executor, on May 9, 1953. On the terms of the memorandum of agreement the father and the grandfather were joint tenants of the farm.

On February 5, 1953, before the grant of probate, a notice to quit was served by the solicitors for the defendant, the present landlord. It was headed "Notice to Quit," and was in these terms: "As solicitors for . . . your landlord we hereby give you "notice to quit and deliver up to your landlord on September 29, "1954, or at the expiration of twelve months from the end of "the now current year of your tenancy possession of the "messuage buildings and enclosures of land known as Jeffries "Farm situate in the parishes of Abbots Langley and Kings "Langley in the County of Hertford containing 87 acres 2 roods "13 perches or thereabouts and more particularly described in "the agreement dated September 24, 1928, made between "Edward Henry Loyd of the one part and Charles Woodward "and Ernest Charles Woodward of the other part and which "said premises are held from year to year. The reason for "giving this notice to quit is as follows: The said Ernest Charles "Woodward died some years ago and the said Charles Woodward "died on December 17, 1952." The notice to quit was dated February 5, 1953, signed by the solicitors and directed to "the "personal representatives of Charles Woodward deceased (the "surviving tenant under the above-mentioned agreement), and "to the occupiers of Jeffries Farm, Abbots Langley, Herts., to "the President of the Probate, Divorce and Admiralty Division, High Court of Justice, and to all others whom it may "concern."

It appeared from the defendant's evidence that the managing clerk in charge of the matter in the solicitors' office intended to serve a notice to quit relating to the whole of the land comprised in the agreement of September 24, 1928. He drafted a notice and then gave it to a typist and directed her to copy the parcels from the agreement in question into the notice. She failed to copy the whole of the parcels on the first page of the body of the agreement, and ignored the schedule showing that there were another 45 acres included in the agreement as well as the 87 acres, 2 roods, 13 perches referred to in the notice itself.

As the notice to quit was not compared and checked with the agreement, the managing clerk did not discover the error until the notice had been sent to the tenant.

The plaintiff served a counter-notice on February 12, 1953, requiring section 24 (1) of the Agricultural Holdings Act, 1948, to apply to the notice.

The plaintiff by this summons asked for a declaration that the notice to quit was invalid on the grounds: (1) that it referred to part only of the land comprised in the tenancy, and (2) that it was not within the exception of section 24 (2) (*g*) of the Agricultural Holdings Act, 1948.[1]

A. C. Goodall for the plaintiff. The notice is invalid for two reasons: (1) it refers to part only of the property comprised in the tenancy, and is therefore bad on the face of it; (2) it is not within the exception of paragraph (*g*) of subsection (2) of section 24 of the Agricultural Holdings Act, 1948, since both tenants had not died within three months of the notice to quit being given,

---

[1] Agricultural Holdings Act, 1948, s. 24: "(1) Where notice to quit "an agricultural holding or part of "an agricultural holding is given to "the tenant thereof, and not later "than one month from the giving of "the notice to quit the tenant serves "on the landlord a counter-notice in "writing requiring that this subsection shall apply to the notice to quit, "then, subject to the provisions of the "next following subsection, the notice "to quit shall not have effect unless "the Minister consents to the operation thereof. (2) The foregoing "subsection shall not apply where— ". . . (*g*) the tenant with whom the "contract of tenancy was made had "died within three months before the "date of the giving of the notice to "quit, and it is stated in the notice "that it is given by reason of the "matter aforesaid."

1954

WOODWARD v. EARL OF DUDLEY.

and the notice is therefore void under section 24 (1) of the Act.

With certain statutory exceptions which do not apply here, notice to quit part of a holding is bad: *In re Bebington's Tenancy.*[2] It is conceded that, where a notice to quit is ambiguous, it will be construed as a good notice for the whole rather than as a bad notice for a part: *Doe* d. *Rodd* v. *Archer.*[3] The notice in this case, however, is unambiguous and clearly refers to only part of the land. The fact that this was due to a slip is immaterial, for notices to quit are technical documents and must be strictly construed: *Hankey* v. *Clavering.*[4]

Alternatively, the notice is void under section 24 (1) of the Agricultural Holdings Act, 1948, since section 24 (2) (*g*), on which the landlord relies, does not apply. As there were originally two joint tenants, paragraph (*g*) must, having regard to section 1 of the Interpretation Act, 1889, be read as " the tenants with whom " the contract of tenancy was made had died within three months " before the date of the giving of the notice to quit. . . ." Where, therefore, there are joint tenants, this paragraph does not apply unless both died within the prescribed three months.

In *Howson* v. *Buxton*[5] Scrutton L.J. was prepared to construe " tenant " in section 12 (7) (*b*) of the Agricultural Holdings Act, 1923, as including one of two joint tenants, but expressly left open the question whether such a construction could be given to section 12 (7) (*c*) of that Act, which is worded similarly to section 24 (2) (*g*) of the Act of 1948. Moreover, it is clear from his judgment that the reason for adopting a liberal construction was that such a construction was justified on the facts of that case on a consideration of the mischief with which the Act was designed to deal, and of the intention of the Act as a whole. Such considerations do not apply in this case. Furthermore, the other members of the court decided the case on somewhat different grounds. That decision is therefore no authority against the plaintiff's contention. The effect of the authorities, apart from that case, is that the words " tenant," " landlord " or " lessee " in a statute must be construed as including the plural, and where there are two of them they must both comply with the words of a statute. It was held in *T. M. Fairclough & Sons Ld.* v. *Berliner*[6] that relief against forfeiture could not be granted to one of two joint lessees; and in *McIntyre* v. *Hardcastle*[7] an application for possession under the Rent Acts by two joint owners was refused on the ground that the house was required by only one of them. [Reference was also made to *Weatherall & Co. Ld.* v. *Stone*.[8]] It may be said that this construction of paragraph (*g*) involves hardship to the landlord, but the decision of the Court of Appeal in *McIntyre* v. *Hardcastle*[9] may equally well be said to have involved such hardship.

---

[2] [1921] 1 Ch. 559; 37 T.L.R. 409.

[3] (1811) 14 East 245.

[4] [1942] 2 K.B. 326; [1942] 2 All E.R. 311.

[5] (1928) 97 L.J.K.B. 749.

[6] [1931] 1 Ch. 60; 47 T.L.R. 4.

H. F. J. Teague for the defendant. There is never in law more than one landlord or one tenant; if there be more than one tenant they must act jointly as they become one person. Where, therefore, there are joint tenants, and one of them has died, the other becomes by survivorship the "tenant" for the purpose of the tenancy. The plaintiff's grandfather was therefore the "tenant" for the purpose of the notice to quit, and as he had died within three months of the date of the notice to quit it was valid under the Act.

The statute must be construed according to the intention with which it was made, namely, that a tenant should not be turned out of his holding (unless it were a case in which the consent of the Minister could be obtained—which is not the position here), except in certain cases, one being under paragraph (*g*), when the tenant died within three months of the notice to quit being given. But Parliament was not by that provision intending to be particularly tender to joint tenants and to put them on a different footing from other tenants, or the Act would have so provided.

With regard to the sufficiency of the notice, a liberal construction, if it be possible, is always placed by the court on a document. There is a distinction between notices which are wrong or insufficient as regards time and those which are wrong or insufficient as regards other matters. Where it is question of incorrect date the notice has always been held bad: *Hankey* v. *Clavering*.[10] Where no one has been misled by the mistake in the notice the court will presume that the landlord intended to give a notice which was a good notice, and which related to the whole of the premises comprised in the lease, and effect will be given to the notice: *Doe* d. *Rodd* v. *Archer*.[11] Similarly, in *Doe* d. *Armstrong* v. *Wilkinson*,[12] where the wrong parish was given, but the tenant held only one farm of the landlord, the notice was held good. If the plaintiff had been misled by the notice, and had acted upon it, the landlord could not now rely on it, but the plaintiff was never misled by this notice.

---

[7] [1948] 2 K.B. 82; 64 T.L.R. 260; [1948] 1 All E.R. 696.

[8] [1950] W.N. 572; 66 T.L.R. (Pt. 2) 1095; [1950] 2 All E.R. 1209.

[9] [1948] 2 K.B. 82.

[10] [1942] 2 K.B. 326.

[11] 14 East 245.

[12] (1840) 12 A. & E. 743.

A mere error of description, in the absence of deception, should not invalidate the notice if the premises are otherwise sufficiently designated and the tenant has not been misled: *Doe* d. *Cox* v. *Roe*.[13] The plaintiff could not have been under any misapprehension as to the scope of the notice, and, in fact, the whole of this holding was often referred to and known as Jeffries Farm.

DANCKWERTS J., having stated the facts, continued: The notice on its face plainly does not refer to the whole of the land comprised in the agreement of September 24, 1928. In fact, if it were desired to give notice for the part of the land relating only to Jeffries Farm, it is difficult to think of a more effective way of calling attention to the fact that the notice related only to that part of the land.

The first ground given by the plaintiff, the tenant and present occupier, for alleging that the notice is bad is that, as the notice refers only to part of the land included in the tenancy, the notice to quit is bad on well-established principles. It is plain from *In re Bebington's Tenancy*,[1] and other cases, that a notice to quit which refers to part only of the land included in the tenancy is invalid and ineffective.

But Mr. Teague, for the landlord, has argued on the authority of *Doe* d. *Rodd* v. *Archer*,[2] that, as it is obvious that the landlord could not have been expected to want to give a bad notice, the notice must be construed in such a way as to give it an effect in law, and it must, therefore, be treated as a notice referring to the whole of the land included in the agreement of tenancy. It is further contended that Jeffries Farm has for long been used as a means of describing not only the land originally known as Jeffries Farm but that part of the farm formerly called Langley Lodge Farm which was included in the tenancy. In *Doe* d. *Rodd* v. *Archer*[2] there were certain circumstances which aided the court in reaching the conclusion that the notice there referred to the manor house or mansion on the property and the notice added the word "etc." In those circumstances, it was possible for the court to reach the conclusion which it did. Mr. Teague also referred to *Doe* d. *Cox* v. *Roe*[3] and *Doe* d. *Armstrong* v. *Wilkinson*,[4] but those cases have little to do with the present case, because they refer to property which was included in the tenancy, and, though there was a mistake in the name of the property, it was perfectly obvious that the notice was referring to property held by the tenant from the landlord, the tenant in those cases holding no other property. They do not therefore assist me in reaching the conclusion which I ought to reach in the present case.

---

[13] (1803) 4 Esp. 185.

[1] [1921] 1 Ch. 559; 37 T.L.R. 409.

[2] (1811) 14 East 245.

[3] (1803) 4 Esp. 185.

[4] (1840) 12 A. & E. 743.

In *Hankey* v. *Clavering*[5] it was pointed out by Lord Greene M.R. that the matter of giving a notice to quit has always been treated as a matter of technicality, and one cannot get out of difficulties merely by saying that there was an obvious mistake, and by saying that the notice which does something wrong should be treated as doing something right. In that case the date of December 21 was referred to, though it was a mistake for December 25, which is the quarter day, when the tenancy would be likely to end. None the less, though the mistake was purely inadvertent, the court refused to cure the mistake in the notice to quit and held that it was ineffective. It is quite plain that the notice in the present case is bad, because it refers in the most definite terms possible to part only of the property included in the relevant tenancy.

That is sufficient to dispose of the case, but I will also consider another point made against the landlord which arises under section 24 of the Agricultural Holdings Act, 1948. [His Lordship read section 24 (1) and (2) (*g*) of the Agricultural Holdings Act, 1948, and continued:]

The reference in the notice to quit to the deaths of Ernest Charles Woodward and Charles Woodward was an attempt to bring the matter within the terms of paragraph (*g*). It seems clear to me, however, that the terms of the paragraph do not apply in the circumstances of this case. It appears from section 1 of the Interpretation Act, 1889, that words in the singular in a statute are capable of being treated as the plural. There were two tenants in this case, Ernest Charles Woodward and Charles Woodward. The notice must therefore be read in the following way: "The tenants with whom the contract of tenancy was "made having died . . ." but the "tenants" with whom the contract of tenancy was made were both Ernest Charles Woodward and Charles Woodward. They did not both die within three months before the date of giving the notice to quit, because

---

[5] [1942] 2 K.B. 326; [1942] 2 All E.R. 311.

Ernest Charles Woodward, the father of the plaintiff, died in 1948. The wording of paragraph (*g*) is such that this case falls outside its terms. Although it is possible that the matter was never considered by the legislature, who would have treated it differently had it been brought to their notice, I have to consider the actual words contained in the statute. It seems to me that no construction of those words is possible other than that which I have stated.

It is argued by Mr. Teague that this paragraph does not apply to the case of a joint tenancy, because joint tenants hold per mie et per tout, and their tenancy is regarded as one and the whole. It is true that there is only one tenancy, but it does not alter the fact that the tenants with whom the contract was made are two persons and not simply one. There is nothing in the terms of the paragraph to include the survivor of the two joint tenants or the survivor of a number of tenants. It is plain that both or all tenants, if they were more than one, must have died within three months of the date of the giving of the notice to quit in order that the terms of the paragraph may be applicable.

This construction is supported by a number of cases in which the court has had to construe the reference in statutes to one person where the position is that there are several persons involved, and it has been decided that where there are several persons involved the singular includes the plural. See, for instance, *T. M. Fairclough & Sons Ld.* v. *Berliner*,[6] *McIntyre* v. *Hardcastle*,[7] *Weatherall & Co. Ld.* v. *Stone*.[8]

In *Howson* v. *Buxton* [9] a liberal construction was given in the circumstances of that case, or was suggested as applicable, by Scrutton L.J., but the other members of the court decided the case on somewhat different grounds. That case was very different from the present. It does not seem to me that it is possible, however liberal one may be in one's desire to construe paragraph (*g*), to give any meaning to it other than that which the words contain and that which I have already stated.

In the absence, therefore, of the consent of the Minister, the landlord is also unable to succeed on this point on the construction of the words of the statute. Accordingly, I am of opinion that the application by the tenant is successful.

I will declare that on the true construction of the notice to quit dated February 5, 1953, and also having regard to section 24 (2) (*g*) of the Agricultural Holdings Act, 1948, the notice to quit is not valid or effective to determine the tenancy now vested in the plaintiff and created by the memorandum of agreement.

---

[6] [1931] 1 Ch. 60; 47 T.L.R. 4.

[7] [1948] 2 K.B. 82; 64 T.L.R. 260; [1948] 1 All E.R. 696.

[8] [1950] W.N. 572; 66 T.L.R. (Pt. 2) 1095; [1950] 2 All E.R. 1209.

[9] (1928) 97 L.J.K.B. 749.

Declaration accordingly.

Solicitors: *George Tilling & Knight, for Norman E. Kelly, Watford, Herts; Taylor & Humbert.*

I. G. R. M.

In re DARK, DECD.
GLOVER AND ANOTHER *v.* DARK AND OTHERS.

1954
Mar. 3.

Roxburgh J.

[1953 D. 2003.]

Settled Land—Trustees—Appointment of new trustees—Retirement of existing trustees—Will—Devise—Property becoming settled land on January 1, 1926—*Personal representatives by representation—Trustees for the purposes of the Settled Land Act—Whether power to retire and appoint new trustees—Settled Land Act,* 1925 (15 *Geo.* 5, *c.* 18), *s.* 30 (3)—*Trustee Act,* 1925 (15 *Geo.* 5, *c.* 19), *ss.* 64, 68 (5). *Trust and Trustee.*

The plaintiffs, personal representatives by representation of the will of a testator who died in 1910, were by virtue of section 30 (3) of the Settled Land Act, 1925, trustees for the purposes of that Act of certain property devised by the will, which became settled land on January 1, 1926. The plaintiffs now desired to retire from the position of trustees of the settlement and to appoint two trustees in their place. On the question whether they themselves had power so to do under the provisions of section 30 (3):—

Held, that the plaintiffs had no power to retire and make such appointments under section 30 (3) of the Settled Land Act, 1925; but that such power was conferred on them by section 64 (1) of the Trustee Act, 1925.

ADJOURNED SUMMONS.

The testator, John Dark, by his will dated September 10, 1908, appointed Stephen Beer, Christmas Dunn and Frank Glover to be

---

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

his executors and trustees. The testator died on February 16, 1910. Stephen Beer died in 1932 and Christmas Dunn died in 1948, leaving Frank Glover sole surviving executor and trustee of the will. On January 23, 1950, Frank Glover died, having by his will appointed Kenneth Frank Glover and Roy Glover, the plaintiffs, to be executors thereof, who thus became executors by representation of the testator.

By virtue of the Settled Land Act, 1925, the property devised by the testator's will and known as the Limebury Estate, became settled land on January 1, 1926, and the plaintiffs as executors for the time being of the testator were by virtue of section 30 (3)[1] of that Act trustees of the settlement for the purposes of the Act, and the legal estate was vested in them either as statutory owners under sections 36 and 37 of the Act, or as personal representatives of Frank Glover.

The plaintiffs now desired to retire from the position of trustees for the purposes of the Settled Land Act, and also from the position as trustees for the purposes of the will of the testator generally, and to appoint two members of the Dark family, Gilbert Dark and Basil Claud Dark (who were willing to accept the trusts) in their place for all purposes. Doubts having arisen whether the plaintiffs under section 30 (3) of the Settled Land Act, 1925, had power to make the appointments themselves, the present summons was taken out for the determination, inter alia, of the questions (1) whether under the powers conferred by section 30 (3) of the Settled Land Act, 1925, or otherwise, the plaintiffs had power to retire from the trusts of the settlement

---

[1] Settled Land Act, 1925, s. 30 (3): "Where a settlement is created "by will . . . and apart from this "subsection there would be no "trustees for the purposes of this Act "of such settlement, then the personal representatives of the deceased "shall, until other trustees are "appointed, be by virtue of this Act "the trustees of the settlement, but "where there is a sole personal representative, not being a trust corporation, it shall be obligatory on him "to appoint an additional trustee to "act with him for the purposes of "this Act, and the provisions of the "Trustee Act, 1925, relating to the "appointment of new trustees and "the vesting of trust property shall "apply accordingly."

Trustee Act, 1925, s. 64 (1): "All "the powers and provisions contained "in this Act with reference to the "appointment of new trustees, and "the discharge and retirement of "trustees, apply to and include trustees for the purposes of the Settled "Land Act, 1925, . . . whether such "trustees are appointed by the court "or by the settlement, or under "provisions contained in any instrument."

S. 68: "In this Act, unless the context otherwise requires, the following expressions have the meanings "hereby assigned to them respectively, "that is to say:— . . . (5) 'Instru- "'ment' includes Act of Parliament."

1954

DARK, DECD., *In re.* GLOVER *v.* DARK.

of the Limebury Estate, and appoint other trustees in their place; (2) that if the answer to question (1) be in the negative, that Gilbert Dark and Basil Claud Dark, or some other fit and proper persons, might be appointed by the court to be trustees of the settlement and for all purposes of the will of the testator in place of the plaintiffs.

T. K. Wigan for the plaintiffs. The plaintiffs desire to retire from the position of trustees of the settlement and to appoint two trustees in their place. It is doubtful, however, whether they have power to do so themselves. The concluding words of section 30 (3) of the Settled Land Act, 1925, " . . . and the " provisions of the Trustee Act, 1925, relating to the appointment " of new trustees and the vesting of trust property shall apply " accordingly " would appear to be confined to the case of a sole personal representative appointing an additional trustee.

I. M. Phillips for Gilbert Dark. It is submitted that the concluding words of section 30 (3) of the Settled Land Act apply to all the preceding words of the subsection and that, accordingly, the plaintiffs have power by virtue of the importation of the Trustee Act, 1925 (including section 64), to retire and appoint trustees in their place. It must be admitted, however, that the various books on conveyancing precedents are by no means unanimous in regard to this question.

G. D. Morton and *A. P. McNabb* for other defendants.

ROXBURGH J. The question which I have to determine is interesting, if only as an example to show how dangerous it is to think that words in an Act of Parliament necessarily mean what they say.

The personal representatives of one Frank Glover are trustees of a settled estate, consisting of a farm in Devonshire, for the purposes of the Settled Land Act, 1925, by virtue of section 30 (3) of that Act. That subsection reads: " Where a settlement is " created by will . . ."—as in the present case—" and apart from " this subsection there would be no trustees for the purposes of " this Act of such settlement "—and that is also this case— " then the personal representatives of the deceased " (and those persons are the personal representatives of the deceased; not directly, but by representation) " shall, until other trustees are " appointed, be by virtue of this Act the trustees of the settle- " ment, but where there is a sole personal representative, not " being a trust corporation, it shall be obligatory on him to "appoint an additional trustee to act with him for the purposes "of this Act, and the provisions of the Trustee Act, 1925, relating "to the appointment of new trustees and the vesting of trust "property shall apply accordingly."

The short point is: can these personal representatives by representation of the deceased (the testator), do what they wish, namely, retire from being trustees of the settlement, for the purposes of the Settled Land Act, 1925, and appoint other such trustees in their place? I am informed that this question has been the subject of learned and serious debate.

In my opinion they have no power to act under the concluding words of subsection (3). At first I thought that perhaps they had such power, but I think that those words are to be confined to the case of a sole personal representative, because those words do not state that the provisions of the Trustee Act relating to the retirement and appointment of new trustees shall apply, but only the provisions of that Act relating to the appointment of new trustees. But, in my judgment, a perusal of the Trustee Act, 1925, with the necessary equipment of the definitions, solves the present problem.

I must begin by pointing out that "instrument" in the Trustee Act, 1925, includes an Act of Parliament: see section 68 (5). Accordingly, in my judgment, section 64 of that Act plainly applies to the present case. That provides: "(1) All the powers "and provisions contained in this Act with reference to the "appointment of new trustees, and the discharge and retirement "of trustees"—it will be noted that there both "appointment" and "retirement" are expressly mentioned—"apply to and "include trustees for the purposes of the Settled Land Act, "1925, . . . whether such trustees are appointed by the court "or by the settlement, or under provisions contained in any "instrument."

Now, these trustees are appointed under the provisions of an instrument as defined in this Act, namely, the Act of Parliament, being the Settled Land Act, 1925. Accordingly, it seems to me that that section exactly fits the present case. Section 64, of course, introduces section 36 of the Trustee Act, 1925, and there is no further difficulty in the case. Accordingly, I answer the question in the affirmative.

Declaration accordingly.

Solicitors: Wigan & Co. for T. A. Goaman & Wright, Bideford.

In re ALLAN.
ALLAN *v.* MIDLAND BANK EXECUTOR AND TRUSTEE CO. AND OTHERS.

C. A.

1954
Feb. 17.

Evershed M.R., Denning and Jenkins L.JJ.

[1953 A. 69.]

Power of Appointment — Construction — " Wife " — Power of appointment before marriage or by will—To " wife " if she should survive appointor — Appointment by irrevocable deed in contemplation of marriage—Subsequent divorce on wife's petition—Whether appointee qualified on death of appointor.

A testator by his will gave to each of his children the following power of appointment in respect of their life interests in the settled residue of his estate: " Each child may by any deeds or deed " revocable or irrevocable executed prior to and in contemplation " of marriage or by will or codicil appoint to or for the benefit " of any wife or husband who may survive him or her an interest " . . . subject to any conditions such child . . . may think fit." The testator's son exercised the power in favour of his intended wife by a deed made in contemplation of marriage and expressed to be irrevocable. The appointment was to take effect if the marriage was solemnized, and if " the said A. V. D. shall survive " me," after the termination of an overriding life interest. The marriage was solemnized but was subsequently dissolved on the petition of the wife. The appointor husband died without having remarried and the appointee survived him:—

Held, that, on the termination of the overriding life interest, the appointee would not be qualified to take the interest appointed to her because when the appointor died, she was no longer his wife.

In re Williams' Settlement [1929] 2 Ch. 361; 45 T.L.R. 541 followed.

Decision of Danckwerts J. affirmed.

APPEAL from Danckwerts J.

The following statement of the facts is taken substantially from the judgment of Evershed M.R.

By his will, made in 1933, the testator, Arthur Campbell Allan, gave a life interest to his widow, and subject thereto gave to each of his children a life interest in the residue of his estate. Subject to those interests, there were gifts to their children in more or less usual form. The relevant part of the will contained a proviso: " Provided always that such child of mine may by " any deeds or deed revocable or irrevocable executed prior to " and in contemplation of marriage or by will or codicil appoint " to or for the benefit of any wife or husband who may survive " him or her an interest for her or his life or any less period in "the whole or any part of such share and subject to any conditions such child of mine may think fit." The testator died in 1934.

In July, 1937, the testator's son, Francis Antony Selby Allan, exercised the power conferred on him by the will shortly before and in contemplation of marriage with the plaintiff, Alida Virginie Allan, then A. V. Duret. The exercise was by deed expressed to be irrevocable, and, so far as relevant, it was as follows: "I "hereby in contemplation of the said marriage irrevocably direct "and appoint that if the said marriage shall be solemnized and the "said Alida Virginie Duret shall survive me then after the death "of the survivor of me and my mother the trustees of the said "will shall out of the income of my settled share under the said "will of my father's residuary estate pay to the said Alida "Virginie Duret the yearly sum of £3,000."

The marriage was solemnized on July 26, 1937, within a few days of the deed, but the son subsequently deserted the wife, and on August 8, 1951, the marriage was dissolved on her petition. The son died, without issue, on December 18, 1951, without having remarried.

The plaintiff, Alida Virginie Allan, took out a summons asking whether she was within the power given by the testator's will, that is to say, whether, in the events which had happened, she, having survived her husband, but having ceased to be his wife before his death, was an object of the power.

R. J. S. Thompson for the appointee, Alida Virginie Allan. The power of appointment conferred by the testator has two distinct purposes. If it was exercised by deed, before or in contemplation of marriage, it was intended that the benefit to the wife should be marriage consideration. Alternatively, the power could be exercised by will, and the manifest purpose of an appointment by will by the terms of the power would be to make provision for the widow of the appointor. There is, therefore, a distinction between this power and the type of power which was considered in *In re Williams' Settlement.*[1] In that case there was one continuous power to appoint throughout the life of the appointor, exercisable by deed in contemplation of, or after, marriage, or by will. In those circumstances it could not be said, as is submitted here, that the qualification if the appointment was by deed was that the marriage should take place. The purpose in *In re Williams' Settlement* [1] was to provide for the person who at the death of the appointor should be his widow, so that if the appointee was not his widow she could not take. In the present case the appointor can choose to which purpose he will direct the exercise of his power, and he has chosen to make the fund part of the marriage consideration. In those circumstances the wife is not deprived of her benefit as a result of exercising her rights in the courts of terminating the marriage.

---

[1] [1929] 2 Ch. 361.

The ground on which *Bullmore* v. *Wynter* [2] was criticized in *In re Morrieson* [3] cannot arise here, for the appointor in choosing which way to exercise the power has excluded the possibility of there being competing candidates in the event of divorce. As the appointment was by deed expressed to be irrevocable, once the marriage took place the wife was entitled to her benefit if she survived the appointor, irrespective of the capacity in which she survived, and the position would have been unchanged even if she, instead of the husband, had been the guilty party. [Reference was made to *Bosworthick* v. *Clegg*.[4]] The distinction between an appointment forming consideration for the marriage and an appointment intended to make provision for the widow is reflected in *In re Slaughter*.[5]

[JENKINS L.J. What would be the effect of an appointment following exactly the wording of the power, that is, an appointment by deed made in contemplation of marriage " to any wife " who may survive " the appointor?]

The particular marriage contemplated would appear from the recitals, and the appointment would be deemed to refer only to that marriage, so that it would be consideration only for that marriage, even though the form of words used was general. In construing the will attention must be paid to the apparent purpose for which the language is used. The language here is capable of meaning " any widow of the appointor," as in *In re Williams' Settlement*,[6] but it is also capable of meaning " any woman with " whom the appointor intermarries who survives him," as in *Bullmore* v. *Wynter* [7] (which was distinguished but not overruled in *In re Williams' Settlement* [8]). The purpose of the language here is in favour of the latter construction.

Raymond Jennings Q.C. and *John Brunyate* for the persons

---

[1] [1929] 2 Ch. 361.

[2] (1883) 22 Ch.D. 619.

[3] (1880) 40 Ch.D. 30.

[4] (1929) 45 T.L.R. 438; [1929] W.N. 133.

[5] [1945] Ch. 355; 61 T.L.R. 453; [1945] 2 All E.R. 214.

[6] [1929] 2 Ch. 361.

[7] 22 Ch.D. 619.

[8] [1929] 2 Ch. 361.

C. A.
1954

ALLAN, *In re.* ALLAN *v.* MIDLAND BANK EXECUTOR AND TRUSTEE CO. LD.

entitled in default of appointment, and *G. A. Grove* for the trustees, were not called on.

EVERSHED M.R. referred to the facts as stated above and continued: Problems of this character have been on other occasions before the courts, and it seems to me that the decided cases make it clear that, in the absence of some special consideration, if a power is given by deed or will to appoint for the benefit of any wife who may survive the appointor, nobody can be an object of that power unless she both survives the appointor and also is his wife at the time of the appointor's death. The most important of the cases, although not the latest, is *In re Williams' Settlement*,[1] which was a decision of the Court of Appeal, Eve J. having decided the case in the sense which I have already indicated. Eve J. said [2]: "Under the settlement made on her marriage to "a Mr. Williams in April, 1902, the lady who at the time of her "death was Mrs. Elias had a power, in the event which happened, "of there being but one child of that marriage, on the occasion "and in contemplation of or after any future marriage, to withdraw from the trusts of the first marriage settlement three-"fourths of the settled fund, and to appoint the same in favour "of the issue of the second marriage and her husband . . . 'but so "'that any husband who may survive her shall not take more "'than a life interest.'" The second marriage had come to grief, and the lady, who was originally Mrs. Williams, and who had become Mrs. Humphries, became eventually Mrs. Elias. She had, on the occasion of her second marriage with Mr. Humphries, exercised the power. All three of her husbands survived her. The question was whether Mr. Humphries was a person within the ambit of the power which I have read. Eve J. decided that question negatively and his opinion was affirmed in the Court of Appeal. Russell L.J. in a succinct judgment (which Danckwerts J. regarded as shortly stating the point) said [3]: "I think this "gentleman is not an object of this power, because he could not "be properly described as a husband of this lady who survived "her."

Mr. Thompson, who has argued strenuously and forcibly for the appointee, says that in truth that citation begs the question; and he points out that Lawrence L.J.[3] referred to *Bullmore* v. *Wynter*,[4] which was relied on by Mr. Thompson, and did not expressly overrule it, but merely distinguished it. Nevertheless it is to my mind clear that the power which was before the court in *In re Williams' Settlement*[5] was construed as a power in favour of a person who had to satisfy two conditions, namely, that of survivorship of the appointor and that of being the appointor's husband at the time of the appointor's death.

---

[1] [1929] 2 Ch. 361.
[2] Ibid. 364.
[3] Ibid. 367.
[4] (1883) 22 Ch.D. 619.

The next question is whether there is in this case any distinguishing characteristic. The answer submitted by Mr. Thompson is that this power to appoint by deed is limited so as to be exercisable only prior to and in contemplation of marriage, and not also afterwards, and Mr. Thompson's point, putting it briefly but I hope not too summarily, is that the manifest purpose of so limiting the power was to enable the husband, not so much to make provision for his wife should she survive him and become his widow, but to provide an adequate marriage consideration in the legal sense. I see the force of that argument, which is reflected to some extent in the language of Vaisey J. in *In re Slaughter.*[6]

The result which the authorities seem to me to render inevitable appears to be somewhat hard for this plaintiff, for by exercising the remedy available to her in the courts of terminating her marriage, she forfeited her chance of a very substantial life interest. But, those considerations cannot be conclusive; indeed, they may not even be relevant. The question is one of construction, and to Mr. Thompson's argument there seem to me to be, at any rate, two answers. First, the question is not so much of the purpose in choosing particular occasions for the exercising of the power, but of the construction of the words which define the objects of the power. Those words are "any wife or husband "who may survive him or her." That definition of the objects of the power is common to the whole proviso, and is equally applicable whether the power is exercised on the occasion of the marriage by deed, or at any time by will. The second answer to Mr. Thompson's point which was put to him in the course of the argument by my brother Jenkins, can be seen by supposing that the appointor had chosen the occasion of the marriage to exercise the power by deed, and had followed exactly the language in the will in stating the object of the appointment: that is, let it be supposed that on the occasion of the marriage, he had directed the trustees to pay, after the death of himself and his mother, the named sum to any wife who might survive him. It seems to me that it would be quite impossible for the plaintiff to assert in

[5] [1929] 2 Ch. 361.

[6] [1945] Ch. 355; 61 T.L.R. 453; [1945] 2 All E.R. 214.

those circumstances that she was entitled to take under the appointment. The result of so looking at the matter is to bring one back to the first answer, which is that the problem is, as I think, to construe the vital words " any wife . . . who may sur-" vive him "; and in the light of the authorities, I am quite satisfied that only one answer can be given to that question.

Although the logic of Mr. Thompson's argument is forcible, I do not think that it is forcible enough to outweigh the other considerations which are fundamental to the decided cases. To yield to his compelling suggestions would be, I think, to interpose refinements in a matter of this kind which would be a source of trouble and difficulty, and which would be highly undesirable in many ways.

I, therefore, agree with Danckwerts J. that the answer must be that the appointment in the circumstances became ineffective, and in my opinion the appeal must fail.

DENNING L.J. If Mrs. Allan had not divorced her husband, she would, on the death of her mother-in-law, be entitled to £3,000 a year, but because she divorced her husband, as she was entitled by law to do, she will not get anything. It seems a very hard result, but it is the result of the language which the testator used.

I agree with my Lord that we have no option but to dismiss the appeal.

JENKINS L.J. I agree.

Appeal dismissed.

Solicitors: *E. H. Silverstone & Co.; Ward, Bowie & Co.*

E. D.

In re TOWN INVESTMENTS LD. UNDERLEASE. McLAUGHLIN *v.* TOWN INVESTMENTS LD.

1954
Feb. 5, 8, 15.

Danckwerts J.

[1953 T. 2036.]

Landlord and Tenant—Underlease—Provision against underletting without consent — Consent not to be unreasonably withheld — Proposed underletting at low rent and in consideration for substantial premium—Consent withheld—Whether unreasonable—Effect of underletting—Lessor's right of re-entry—Relief for underlessee—Bankruptcy of underlessor—Distress—Lessor's right against underlessee.

The defendants, present owners of a term of 63 years from December 25, 1932, demised to the plaintiff by an underlease dated October 23, 1951, the property, certain business premises in the West End of London, for a term of 21 years. The underlease contained a covenant not to assign or part with the possession of the demised premises or any part thereof without the landlords' consent, which was not to be unreasonably withheld. At the date of the underlease there were in existence certain tenancies of parts of the property, and the underlease was made subject to them.

In September, 1953, the plaintiff agreed to underlet part of the premises (subject to the defendants' consent) to one R. from June 24, 1953, until September 26, 1972, at a rent which was admittedly well below the rent currently obtainable in the open market for this part of the premises, and in consideration of a substantial premium. The defendants objected to the proposed underletting:—

Held, that the defendants had not unreasonably withheld their consent to the proposed underletting, for (1) the proposed rent to be paid by the undertenant was so low as to raise reasonable doubts that the defendants might be unable to recover under section 6 of the Law of Distress Amendment Act, 1908, the full amount of any arrears of rent which might in the future be owing by the tenant; (2) when a lessor took a premium from a tenant as consideration for a reduction in the rent which he could otherwise obtain on the open market, the lessor subtracted something, which might be substantial, from the future earnings of the property in question; and accordingly a landlord was not acting unreasonably in refusing to approve a transaction which he honestly considered was calculated to depreciate the value of the property in the future, and which might prove an embarrassment in negotiations for its subsequent sale or mortgage.

Premier Confectionery (London) Co. Ld. v. *London Commercial Sale Rooms Ld.* [1933] Ch. 904 and *Shanly* v. *Ward* (1913) 29 T.L.R. 714 applied.

ADJOURNED SUMMONS.

The following statement of the facts is taken substantially

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

1954

TOWN INVESTMENTS LD. UNDERLEASE, *In re.*

from the judgment: This was an application by a tenant, John Charles McLaughlin, for a declaration that the refusal of his landlords to consent to a proposed underletting was unreasonable, and that notwithstanding such refusal he was entitled to sublet. The property in question was 28, Berkeley Square, London, W.1. The defendants, the landlords, were the present owners of a term of 63 years from December 25, 1932, at a rent of £800 per annum created by a lease dated April 4, 1933, and made between the second Duke of Westminster of the one part and Harry Parker of the other part. By an underlease dated October 23, 1951, the defendants demised the property to the plaintiff for a term of 21 years from September 29, 1951, at a rent of £2,500 per annum until September 29, 1954, the first three years, and thereafter at a rent of £3,750 per annum. That underlease contained full repairing covenants and a covenant not to assign, transfer, underlet or part with the possession of the demised premises or any part thereof without the previous written consent of the landlords, which consent was not to be unreasonably withheld.

At the date of the underlease there were in existence certain tenancies of parts of the building, and the underlease was made subject to them. Those were a tenancy of the first floor from March 25, 1934, until March 25, 1955, at a rent of £450 per annum inclusive of rates, a tenancy of the second floor from June 24, 1947, until June 24, 1954, at a rent of £425 inclusive of rates, and a tenancy of the third floor from September 29, 1948, until September 29, 1955, at a rent of £400 inclusive of rates. Those tenancies had comparatively short periods to run, and the increased rent to be paid by the plaintiff from September 29, 1954, was explained by the anticipation that the respective floors of the premises could be let at enhanced rents as the tenancies expired. The plaintiff agreed, subject to the defendants' consent, to let the fourth floor of the premises to a company for a term of seven years from June 24, 1953, at a rent of £650 per annum inclusive of rates, and the defendants intimated their willingness to consent, though no formal consent had yet been granted.

The present application was concerned with the ground floor, part of the basement and one room on the mezzanine floor of the premises, which were used for the purpose of a luncheon and dining club known as "The Mayfair Club." Such user was the subject of a licence dated October 19, 1951, and made between the Duke of Westminster of the one part and the defendants of the other part. In September, 1953, the plaintiff agreed to let that part of the premises, subject to the defendants' consent, to one Leslie Romain from June 24, 1953, until September 26, 1972, that was, three days short of the expiration of the plaintiff's term, at a rent of £800 per annum, exclusive of rates and in consideration of a premium of £11,500. It was said by the plaintiff in evidence that that premium did not wholly represent a capitalization of rent, and included elements representing the desire of Romain to succeed the plaintiff as secretary of the Mayfair Club at a substantial salary and the waiving by the plaintiff of a claim to arrears of salary as secretary of the club.

In addition to the rent of £800 per annum, Romain was to undertake certain cleaning and heating services in respect of the building, which would otherwise have had to have been provided by the plaintiff and which were estimated to be of the value of £400 per annum. Satisfactory references were provided by Romain, but those were obtained on the footing that the rent payable by him would be £800 per annum. The objection taken by the defendants to the proposed underletting was based on the provision for a rent which was admittedly well below the rent currently obtainable on the open market for that part of the premises, which was said on behalf of the defendants to be £2,000 per annum, and on behalf of the plaintiff to be £1,565 per annum, in each case exclusive of rates and without the obligation to provide cleaning and heating services, and the taking of a substantial premium from the proposed underlessee.

On the basis that £650 per annum would be obtainable as rent of the fourth floor and that the remaining part of the basement could be let for £250 per annum, it was estimated by the plaintiff that the rents obtainable, after the letting to Romain, in the near future for the whole building would amount to £2,975 per annum less the rates payable by the plaintiff in respect of the first and fourth floors, estimated at £428 per annum. The plaintiff's expert estimated, on the basis of Romain paying an annual rent of £1,200, the probable future total rental of the property (after expiration of the existing tenancies) at £4,575 exclusive of rates. Neither of those totals included any figure in respect of the cleaning and heating services which the plaintiff would have to provide, and the cost of the repairs and insurance for which the plaintiff was responsible under the terms of his underlease, or any expenses of management. If allowance were made of the sum of £400 in respect of cleaning and heating and of the sum of £325 in respect of the other obligations of the plaintiff under his lease, it would appear that the rents obtainable by the plaintiff in each of the two situations contemplated would fall short of his total obligations under the terms of his underlease, though not by a very large sum.

The objections of the landlords to the proposed underletting were based (1) on the lack of security which it was contended would be created by the rents from the undertenants in the event of the plaintiff or his assigns failing to carry out the obligations of his underlease; and (2) the depreciatory effect which it was claimed the underletting at an unduly low rent would have in the event of the landlords wishing to dispose of the property by sale or mortgage.

E. Milner Holland Q.C. and *T. M. Eastham* for the plaintiff. The defendants' refusal to consent to the proposed underletting is unreasonable. In the event of default by the plaintiff or his assigns the defendants would be in a position to exercise their rights, and any undertenant of the plaintiff would only be granted relief from forfeiture under section 146 of the Law of Property Act, 1925, on the terms that the undertenant would assume the obligations of the lessee as to rent and so forth in respect of that part of the property included in the underlease: *Ewart* v. *Fryer*[1]; *Wardens of Cholmeley School, Highgate* v. *Sewell*.[2] Further, the defendants would not be prejudiced even if the plaintiff were adjudicated bankrupt, for under the provisions of the Bankruptcy Act, 1914, on disclaimer of the lease by the plaintiff's trustee, the undertenant could only obtain a vesting order on the terms of the main lease.

There is little or no weight in the contention that the payment of the premium would tend to be overlooked in any future transaction concerning the property, so that the low rent actually payable might result in the depreciation of the value of this property. The true test in the present case is whether the landlord will be prejudiced by the proposed transaction. The prejudice must relate to the particular property, and in determining whether there is prejudice a comparison must be made of the landlord's position before and after the proposed transaction; if he is no worse off—and in this case it is submitted that he is not—then there is no prejudice.

An objection by the lessor must relate either to the personality of the proposed underlessee, or to the proposed user of the premises, or to some prejudice which will arise out of the

[1] [1901] 1 Ch. 499; 15 T.L.R. 145.

[2] [1894] 2 Q.B. 906.

transaction; for example, whether the underletting will result in the creation of a statutory tenancy under the Rent Restrictions Acts: *Lee* v. *K. Carter Ld.*[3] The general principles are stated in *Houlder Brothers & Co.* v. *Gibbs.*[4] The mere fact that the proposed underlease is at a lower rent than the headlease is not a valid reason for the landlord withholding his consent: *Balfour* v. *Kensington Gardens Mansions Ld.*[5] If the defendants' contention in the present case is right, it follows that no premium could be taken from an underlessee, unless he was incautious enough to pay the full market rent.

L. A. Blundell for the defendants. The question is: have the landlords dealt with this matter in the way in which a reasonably prudent man of business would have dealt with it? That is the correct test; it is not a question of finding as a fact whether the landlords *will be* prejudiced by the proposed transaction. *Houlder Brothers & Co.* v. *Gibbs,*[6] *Viscount Tredegar* v. *Harwood*[7] and *Premier Confectionery (London) Co. Ld.* v. *London Commercial Sale Rooms Ld.*[8] establish that what the court has to determine is (a) whether the defendants reasonably believe that the granting of this underlease will adversely affect their interest in the property; and (b) whether that opinion may be entertained by reasonable persons. The defendants are entitled to consider the proposed transaction in relation to all the surrounding circumstances. First, this underletting concerns, inter alia, the most valuable part of the premises, namely, the ground floor of the building, and the proposed rent is substantially below the full economic rent obtainable for that part of the property. Secondly, a substantial cash premium is to be paid to the plaintiff in consideration of the grant of the underlease. Thirdly, if this particular transaction is completed while the remainder of the property is still subject to the current leases, and if the undisputed figures as to the amount of outgoings in respect of the property borne by the plaintiff are accepted, it will result in the plaintiff's income from the rents being less than his present liability to the defendants by about £250.

As to future possibilities and probabilities, it would appear that on any footing—whether the figures put forward by the defendants' or the plaintiff's experts are accepted—the estimated income from rents receivable by the plaintiff will be less than his

---

[3] [1949] 1 K.B. 85; 64 T.L.R. 536; [1948] 2 All E.R. 690.

[4] [1925] Ch. 575.

[5] (1932) 49 T.L.R. 29.

[6] [1925] Ch. 575.

[7] [1929] A.C. 72.

[8] [1933] Ch. 904.

1954

TOWN INVESTMENTS LD. UNDERLEASE, *In re.*

total commitments to the defendants. If the defendants are informed by qualified persons that there will be such a deficiency, they are acting reasonably in accepting the advice of those experts, even although the figures may or may not be correct.

It is also important to bear in mind the possible effect which this transaction may have on the defendants' financial position. There are two contingencies: (a) the plaintiff performs his obligations throughout the term of the lease; (b) the plaintiff defaults. In the first case, even if the plaintiff continues to perform his obligations, nevertheless the defendants are entitled to take into consideration as reasonably prudent persons the depreciatory effect which this transaction might have on a sale or mortgage of the property. The experts advising the defendants have pointed out that this transaction might adversely affect negotiations for the subsequent sale or mortgage of this property having regard to the substantial premium which is involved, and the correspondingly low rent. In the second event—the plaintiff making default in performance of his obligations under the lease—it might well be, in view of the figures which have been supplied, that the defendants will be unable under the provisions of section 6 of the Law of Distress Amendment Act, 1908, to recover from the rents payable by the other undertenants the full amount of any arrears of rent owing by the plaintiff.

Taking the above considerations into account, it cannot be said that the defendants have been unreasonable in withholding their consent, and it is plain upon the authorities that the onus of proving that they have acted unreasonably is upon the plaintiff. The defendants have acted as a reasonable man might have acted in the circumstances. The word "might" is stressed; it was used by Bennett J. in *Premier Confectionery (London) Co. Ld.* v. *London Commercial Sale Rooms Ld.*[9] The plaintiff cannot succeed merely because a reasonable man might not have acted as the defendants have acted; he must show that no reasonable man would have so acted in the circumstances. There is a strict onus on the plaintiff, and he has not discharged it: see *per* Lord Cozens-Hardy M.R. in *Shanly* v. *Ward.*[10] [Reference was also made to *In re Thompson and Cottrell's Contract*[11]; *Ex parte Walton*[12]; Williams on Bankruptcy, 16th ed., p. 403.]

Milner Holland Q.C. in reply. It is not sufficient for the defendants' purposes that they genuinely entertain the fears which they allege as reasons for their refusal if in fact those fears are groundless. In particular, there is no reason to suppose that the premium would be overlooked in any explanation in reply to an inquiry by a prospective purchaser or mortgagee of this property why the rent for the ground floor and part of the basement of these premises was only £800 a year. [*Premier Confectionery (London) Co. Ld.* v. *London Commercial Sale Rooms Ld.*[13] was referred to.]

---

[9] [1933] Ch. 904, 911.

[10] 29 T.L.R. 714.

[11] [1943] Ch. 97; 59 T.L.R. 127; [1943] 1 All E.R. 169.

[12] (1881) 17 Ch.D. 746.

Cur. adv. vult.

DANCKWERTS J. stated the facts, referred to the objections of the defendants to the proposed underletting and continued: It is necessary, therefore, to examine the situations which might arise in case of default by the underlessee, who might, of course, be some assignee with less financial resources than the plaintiff is said to possess.

First of all, however, it should be stated that while a lessee in the plaintiff's position will normally seek to exploit the investment represented by his lease by letting at increased rents, the landlords cannot compel him to let at all, and the lessee is perfectly entitled to retain all the floors of the building in his hands. If, on the other hand, the lessee desires to let, the terms of his lease compel him to obtain his landlords' written consent. If they refuse consent to a proposed letting, the onus is on the lessee—that is the plaintiff—to show that such consent has been unreasonably withheld.

Secondly, when property is underlet, the landlords of the underlessor do not become either in privity of contract or in privity of estate with the underlessees, and so long as the underlessor fulfils the terms of his lease, as to payment of rent and otherwise, and the terms of the underleases and the operation of the underlessees do not conflict with the provisions of the lease, the landlords have no right of action against the underlessees. It is only when default is made by the underlessor or his assigns that the question arises as to the remedies which the landlords may have against the underlessees.

Upon default by the underlessor, the landlords will normally be entitled to exercise their right of re-entry under the lease, so as to cause a forfeiture and to give them a right to possession against not only the underlessor but also his undertenants whose terms are brought to an end. The undertenants are then entitled to apply for relief by section 146 (4) of the Law of Property

---

[13] [1933] Ch. 904.

1954

TOWN INVESTMENTS LD. UNDERLEASE, *In re.*

Danckwerts J.

Act, 1925, which replaces section 4 of the Conveyancing Act, 1892. But under section 146 (4) of the Act of 1925, on the application of an undertenant, the court does not preserve or restore the undertenancy, but creates a new estate, in either the whole of the property subject to the lease or a part, as may be required. The court does not allow the landlord to be prejudiced by the relief given, and will have regard to the need to do justice to the landlord as well as to the undertenant, and the rent payable by the undertenant may be increased to the amount of the lessee's rent, as a term of relief from the forfeiture: see *Ewart* v. *Fryer* [1]; *Wardens of Cholmeley School, Highgate* v. *Sewell.* [2] In the last mentioned case, the court specifically rejected the contention that the payment of a premium by the undertenant to the lessee would justify relief on terms of paying a lower rent than that payable by the lessee under his lease. Normally it would appear that on granting relief the court will require the undertenant to assume the obligations of the lessee as to rent and otherwise, relative to the part of the property included in the underlease. It would appear, therefore, that the lowness of the rent payable by the undertenant is not likely to injure the landlords in the event of an undertenant having to apply for relief from forfeiture. The fact that the undertenant had paid a premium might indeed make the undertenant anxious to obtain such relief, so as not to lose wholly the benefit of the sum which he had paid. If the undertenant does not apply for relief from forfeiture, the landlord is free to relet the property. On a falling market, the undertenant may be less willing to apply for relief, and the rent payable by the lessee may not be obtainable on a reletting, but this is a risk which the landlord has to face in any case.

Another situation which may arise is that the lessee may suffer adjudication in bankruptcy, and the trustee in bankruptcy may disclaim the lease under section 54 of the Bankruptcy Act, 1914. The disclaimer determines the liabilities of the bankrupt lessee, but does not, except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability affect the rights or liabilities of any other person: section 54 (2). Consequently, the interest in the property of an undertenant is not determined: *In re Thompson and Cottrell's Contract.* [3] Though contractually only liable to pay the rent reserved on the creation of his undertenancy, the undertenant is liable to be distrained upon by the landlord for the higher rent payable by the bankrupt lessee, and has only a right of proof in the bankrupt's bankruptcy for the amount of the difference between the two rents: *Ex parte Walton.*[4] The result will usually be that the undertenant will apply for a vesting order under the power conferred upon the court by subsection (6). But the court has no power under this provision to make a vesting order in favour of an underlessee except upon the terms of making him (a) subject to the same liabilities and obligations as the bankrupt was subject to under the lease in respect of the property at the date when the bankruptcy petition was filed, or (b) if the court thinks fit, subject to the same liabilities and obligations as if the lease had been assigned to that person at that date, and in either event (if the case so requires) as if the lease had comprised only the property comprised in the vesting order.

---

[1] [1901] 1 Ch. 499; 15 T.L.R. 145.

[2] [1894] 2 Q.B. 906.

[3] [1943] Ch. 97; 59 T.L.R. 127; [1943] 1 All E.R. 169.

It was contended on behalf of the defendants that in the present case the ability of the undertenant to pay the higher rent payable by the plaintiff might have been affected adversely by the large premium payable by him, and it was pointed out that his references had been directed to a rent of £800 per annum only. But these points did not impress me, and I do not think that the proposed transaction can materially injure the defendants in the event of their tenant becoming bankrupt.

The third matter which might arise in the event of the defendants' tenant making default in performance of his obligations under the lease is in regard to the landlord's rights under the Law of Distress Amendment Act, 1908. Under section 6 of that Act, when the tenant's rent is in arrear, the landlord may serve upon an undertenant a notice by registered post stating the amount of the arrears and requiring all future payments of rent, whether the same has accrued due or not, by the undertenant to be made direct to him, the superior landlord, until such arrears have been duly paid. If the rent payable by the undertenant for his portion of the property is less than the proportion of the rent payable by the tenant and attributable to that portion, the landlord's remedy under this section may not be wholly effective to cover the arrears of rent, unless the undertenants of other parts of the property are liable to pay rents of a comparatively higher amount, so that, in the aggregate, the rents payable by the undertenants are more than sufficient to secure to the landlord the discharge of the arrears of rent which the tenant has failed to pay. On the figures put in evidence in the present case, it would seem that there might be a deficiency in this respect, and that the proposed rent to be paid by Mr. Romain in the present case might endanger the recovery by the defendants under section 6 of the Law of Distress Amendment Act, 1908, of the full amount of any arrears of rent owing by the tenant, though possibly not to any great extent.

---

[4] (1881) 17 Ch.D. 746.

I now turn to the question of the depreciatory effect which it is alleged the proposed transaction will produce in the event of the defendants wishing to sell or mortgage the term of years which they have in the property. The evidence on which the defendants rely is contained in the affidavits of Alfred John Southern and Albert Leslie Walton. It is claimed on behalf of the defendants that this evidence represents expert advice which the defendants have received as to the risks which the proposed transaction involves for them and to which it is reasonable for them to pay heed, and which it would be unreasonable for them to disregard. The defendants are a limited company and, therefore, are necessarily managed and controlled by individual persons. Southern is a surveyor, but he is also the managing director of the defendant company, and his views, therefore, must, I think, be treated as the views of the defendants, rather than advice obtained from an independent expert. It does not follow, however, that his views are not entitled to consideration. Walton is a chartered surveyor and a partner in the firm of chartered surveyors who are the managing agents for the defendants' property. He says that he has nothing to do with the management of the property and claims to have considered the present problem objectively on the basis of his experience of the valuation of London properties for sale, purchase and mortgage. In my view, it is right to treat the views expressed by these two persons as the views reached by persons concerned with the conduct and management of the defendants' business as property owners, based on their professional experience, and honestly held with regard to the interests of the defendants.

In his first affidavit, Southern states that the proposed letting at a rent so much below the full value of the part of the premises concerned will tend to depreciate the value of that part of the premises on any future letting, sale or mortgage, the tendency being to overlook or discount a premium after the lapse of some time or to attribute it wholly or partially to other factors such as goodwill, furniture and fittings, and other such like matters.

Walton, in his affidavit, states that a prospective purchaser would require, in addition to the lessee's covenants, the security of the property itself, and that knowledge that an undertenant was paying a rent less than that payable by the lessee or obtainable in the open market would create an adverse impression. He later elaborates this somewhat and inaccurately refers to subtenants having established rights to occupation in the event of forfeiture. What Walton really means is, I think, that a prospective purchaser would inquire as to the terms on which the property was let to undertenants, and, on hearing that their aggregate rents exceeded the rent payable by the lessee, would say to himself: "The rent payable by the lessee "is fully secure, because in the event of his default, obviously "the property can be let for a greater sum per annum," whereas if he found out that the undertenants' rents in the aggregate were less than the rent payable by the lessee, he might conclude, or at any rate fear, that the rent payable by the lessee represented an over-valuation of property, and he might think it prudent not to pursue the transaction any further.

The question which I have to decide now is whether the possible deficiency of undertenants' rents in case of distress and the fears which might be entertained by a prospective purchaser or mortgagee from the defendants are a sufficient justification for the defendants' refusal of consent to the proposed underletting.

In the numerous cases which have been decided upon the reasonableness of refusals by a landlord of consent to an assignment or underletting, the grounds have usually been concerned with the financial stability of the proposed assignee or tenant, or the use to which he proposed to put the property. In the present case, no real objection is raised in regard to the financial reliability of the proposed undertenant and no objection is raised in regard to the proposed use of the portions of the property, which is a continuation of the existing use. It is somewhat surprising that occasion appears not to have arisen hitherto to consider the case where a reduced rent is to be taken in consideration of the payment of a substantial premium. No case cited to me deals at all directly with this problem, though I was referred to a number of cases supposed to lay down the principles applicable to the withholding of the landlord's consent.

In *Houlder Brothers & Co. Ld.* v. *Gibbs*,[5] the lessor refused to consent to an assignment because the proposed assignee was already tenant of adjoining premises belonging to the lessor, and the lessor feared that he would lose good tenants of the latter premises. The refusal was held to be unreasonable because it had no reference either to the personality of the proposed assignee, or to the subject-matter of the lease. Sargant L.J. expressed this view by saying that the reason for refusing had nothing whatever to do with the relationship of landlord and tenant in regard to the subject-matter of the demise.

---

[5] [1925] Ch. 575; 41 T.L.R. 487.

That decision of the Court of Appeal, however, did not escape criticism in the House of Lords in *Viscount Tredegar* v. *Harwood.*[6] In that case, the question of reasonableness did not necessarily arise, as the House held that the landlord had an absolute right to refuse approval of assurance of the property in an alternative fire insurance office without entering upon reasons. It was, however, said that if approval could not be unreasonably withheld, it was reasonable to withhold approval on the ground that the proper management of the landlord's estate required that all houses upon his estate should be insured in the same office. In referring to *Houlder Brothers & Co.* v. *Gibbs,*[7] Viscount Dunedin observed that he was not inclined to adhere to the pronouncement that reasonableness was only to be referred to something which touched both parties to the lease. He said he would "read reasonableness in the general sense."[8]

In *Balfour* v. *Kensington Gardens Mansions Ld.*[9] the tenant, who had rented a flat at a rent of £700 per annum, wishing to join her husband in Peru in a hurry, could only find a willing subtenant of her flat at an annual rent of £450. The landlords were only willing to agree to this subletting on the terms that the subtenant entered into a direct covenant with them to pay the rent of £700 reserved by the lease, and it was held that their consent had been unreasonably withheld. This case bears a superficial resemblance to the present case, but the landlords' demand for a direct covenant by the subtenant to pay a higher rent to the landlords than would be payable by the subtenant under his tenancy was something which the landlords had no right to demand, and was considered by Macnaghten J. to be in effect a refusal to consent to underletting at all, having regard to the fact that £450 was the best rent that it was possible to obtain.

---

[6] [1929] A.C. 72; 44 T.L.R. 790.

[7] [1925] Ch. 575.

[8] [1929] A.C. 72, 78

[9] (1932) 49 T.L.R. 29.

In *Lee* v. *K. Carter Ld.*,[10] a refusal of consent to an assignment on the ground that it would enable the assignee to claim a right to remain in occupation under the Rent Restriction Acts was held by the Court of Appeal to be justified. This case, at any rate, shows that the effect of the transfer on the future rights of the landlord is admissible as a ground for refusal of consent.

The two cases which seem to me to be of most assistance in regard to the present problem are *Premier Confectionery* (*London*) *Co. Ld.* v. *London Commercial Sale Rooms Ld.*[11] and *Shanly* v. *Ward.*[12] In the first of these cases, a tobacconist's shop and a kiosk used for the same trade were in the hands of one tenant, and it was desired to assign the tenancy of the kiosk to a separate tenant. The landlords refused consent to the assignment on the ground that the trade from the kiosk competed with the trade from the shop and that it would be detrimental to their interests that the two properties should be in different hands. Their refusal was held by Bennett J. to be justified. Bennett J. said[13] " But it " is clear from the evidence (a) that the rent of the shop is high, " whilst the rent of the kiosk is low, and (b) that the kiosk takes " a substantial part of the trade which before it was opened as " a tobacconist's shop was done at the shop. It is beyond " question, in my judgment, that anyone trading in tobacco " and cigarettes at the kiosk will always be a formidable com- " petitor of anyone carrying on the same trade at the shop. It is " clear, in my judgment, that it is very unlikely that anyone " can be found who will take an assignment of the agreement " for a lease of the shop if the kiosk is separately occupied by a " tobacconist. Mr. Singer may, of course, be able to pay the " rent of the shop for the residue of the term for which the " defendants have agreed to grant him a lease; . . . and I have " no doubt, after hearing all the evidence, in concluding that if " the shop were to come into the possession of the defendants " during the continuance of the agreement relating to the kiosk " the defendants would have the greatest difficulty in finding a " tenant for it at anything approaching the rent which is now " reserved. If the defendants have in law the right to consider " the possible effect upon their property of the shop and the kiosk " being in occupation of different tenants, I have no doubt that " in withholding their consent to the assignment of the kiosk to

---

[10] [1949] 1 K.B. 85; 64 T.L.R. 536; [1948] 2 All E.R. 690.

[11] [1933] Ch. 904.

[12] (1913) 29 T.L.R. 714.

[13] [1933] Ch. 904, 910, 911.

"Mrs. Kramer they did not act unreasonably. They acted as a "reasonable man might have acted in the circumstances. The "real question is whether as a matter of law the defendants, for "the purpose of determining whether or not they would give "their consent to the assignment, had the right to consider the "effect upon their property, and in particular upon the shop "which is a part of it, of the kiosk being occupied separately "from the shop, and by a tenant bound to carry on there a trade "which will compete with the trade for which the shop is best "suited. In my judgment, they have."

It is, of course, true, as pointed out by counsel for the plaintiff, that in that case Bennett J. found on the evidence that the landlords' apprehension of injury to their interests as owners of the properties was well founded. But the case is authority for the proposition that, in considering whether to give or withhold consent, the landlords were entitled to consider the effect which the transactions might have upon their ability in the future to let satisfactorily the different parts of their property, particularly in case of default on the part of their tenant in performing his obligations.

In the other case, *Shanly* v. *Ward*,[14] the lessors had originally refused consent, but later had modified their attitude. The case is of interest because Lord Cozens-Hardy M.R. said that it was not for the defendants to prove that they were justified in withholding their consent, but for the plaintiff to prove that it was unreasonably withheld.[15] "What did unreasonableness mean?", he said. "It was not enough to show that other lessors might "have accepted the proposed assignees; the lessors were not to "be held to have withheld the licence unreasonably if in the "action they took they acted as a reasonable man might have "done in the circumstances."

Counsel for the defendants relied upon this decision as showing that it was sufficient for his purpose if a reasonable man in the defendants' position might have regarded the proposed transaction as damaging to his property interests, even though some persons might take a different view.

I can apply these decisions to the present case. The dangers to the defendants from the defendants having to forfeit the plaintiff's lease, owing to failure to perform its obligations by the plaintiff or his assigns, may be negligible. The situation in the event of bankruptcy of the plaintiff or an assign may present

---

[14] 29 T.L.R. 714.

[15] Ibid. 715.

1954

TOWN INVESTMENTS LD. UNDERLEASE, *In re.*

Danckwerts J.

no real difficulty. But those who manage the defendant company think that notice under section 6 of the Law of Distress Amendment Act, 1908, might not produce sufficient rent to discharge the sums payable in respect of the rent under the plaintiff's lease. They are apprehensive also that, if they wished to realize their investment in the lease of No. 28, Berkeley Square, by sale or to raise money on it by mortgage, the reduced rent payable by Mr. Romain might prove an embarrassment in their dealings. I cannot say that such a view is unfounded. When a lessor takes a premium from a tenant as consideration for a reduction in the rent which he could otherwise obtain on the open market, the lessor subtracts something, which may be substantial, from the future earnings of the property in question. It is true that the superior landlords cannot compel him to sublet at all; but, if he does wish to sublet, why should they assist in and approve a transaction which they consider is calculated to depreciate the value of their property in the future? I am unable to say that the defendants have acted unreasonably in refusing their consent to the proposed underletting in the present case. Accordingly, the application fails and must be dismissed.

Application dismissed.

Solicitors: *Isadore Goldman & Son; Burton & Ramsden.*

In re AZOFF-DON COMMERCIAL BANK.

[0083 of 1953.]

1954
Feb. 23, 24, 25, 26;
Mar. 10.

Wynn-Parry J.

Company — Winding up — Foreign corporation — Foreign company dissolved in Russia—Unregistered company—No place of business in England—Outstanding assets in England—Petition to wind up—Opposition by Crown — Claim to assets as bona vacantia — Jurisdiction to wind up—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *ss.* 319, 353, 354, 399 (5) (*a*), 400.

Crown—Prerogative—Whether cut down by statute—Bona vacantia—Companies Act, 1948.

An incorporated Russian bank had been dissolved in Russia by 1922. It had never had an office or place of business in England and was not registered under the Companies Acts, but had carried out a number of mercantile transactions in England, was a customer of and a shareholder in an English bank, and had substantial assets in England. Five Norwegian banks presented a petition for the winding up of the company. The Crown opposed the petition and claimed that the English assets of the company were bona vacantia, and that there was no jurisdiction to make a winding-up order without the Crown's consent; that the company had not carried on business in England in such a way as to found jurisdiction to make such an order; and that, if there was jurisdiction, an order should not be made at the suit of foreign creditors, but that it should be left to the Crown to get in the assets so as to make ex gratia payments to English creditors in respect of irrecoverable rouble debts:—

Held, making an order as prayed: (1) that the Royal prerogative in respect of bona vacantia was cut down by the provisions of the Companies Act, 1948: the highest title which the Crown could have was a defeasible title liable to be defeated by a winding-up order, which under the appropriate conditions could be made without its consent.

Attorney-General v. *De Keyser's Royal Hotel Ld.* [1920] A.C. 508; 36 T.L.R. 600; *Food Controller* v. *Cork* [1923] A.C. 647; 39 T.L.R. 699; and *Russian and English Bank* v. *Baring Brothers & Co. Ld.* [1936] A.C. 405; 52 T.L.R. 393; [1936] 1 All E.R. 505 applied.

(2) That, as there were substantial assets in England on which a winding-up order could operate, there was jurisdiction to make an order, and that the exercise of that jurisdiction would be justified.

Banque des Marchands de Moscou (Koupetschesky) v. *Kindersley* [1951] Ch. 112; 66 T.L.R. (Pt. 2) 654; [1950] 2 All E.R. 549 applied.

(3) That the contention that a winding-up order should be refused, so that the Crown could distribute the assets in the way suggested, was unmeritorious and contrary to the general principle that assets should be distributed among the whole body of creditors.

Observations of Pearson J. in *In re Kloebe* (1884) 28 Ch.D. 175, 180; 1 T.L.R. 139 applied.

PETITION.

On November 17, 1953, a petition was presented by certain Norwegian banks for the compulsory winding up of Azoff-Don Commercial Bank. That bank was established in 1871 under the law of the Empire of Russia and the evidence showed that it had by 1922 been dissolved under the laws of the Union of Soviet Socialist Republics. Its head office had been at Petrograd; it had never had an office or place of business in England and particulars of it were not registered under the Companies Acts.

The petitioners were creditors of the company for Kr. 5,944,393 (approximately £297,545), and the petition was opposed by the Crown and by another person, who, the court held, had no locus standi in the proceedings.

The Crown contended (1) that, on the dissolution of the company, the assets became vested in the Crown as bona vacantia; (2) that the court had no jurisdiction to wind up the company; and (3) that, even if there were jurisdiction to wind up the company, the court should leave the Crown to get in the English assets, with a view to the Crown being in a position to make ex gratia payments among English creditors in respect of rouble debts, which would otherwise not be recoverable.

J. B. Lindon Q.C. and *K. B. Suenson-Taylor* for the petitioning creditors. It is known that there are shareholders in this company. A winding-up order may discover other assets. The Russian bank had no office or place of business in this country. The test is whether or not the company, which was dissolved in Russia, had assets in this country: see section 399 of the Companies Act, 1948.

Sir Reginald Manningham-Buller Q.C., S.-G., and *Denys Buckley* for the Attorney-General. The Crown claims the English assets of the company as bona vacantia, and it is therefore not possible for the court to make a winding-up order without the Crown's consent. In this case the Crown does not consent, on three grounds: (1) that without the Crown's consent the court has no jurisdiction to make the order; (2) that it is not open to the court to make a winding-up order in respect of an unregistered foreign company, which never carried on business in this country; and (3) that, even if the court had jurisdiction, it should not make the order, so that the Crown might be in a position to get in the English assets, in order to be able to make ex gratia payments to English creditors in respect of rouble debts, which would otherwise be irrecoverable.

Lindon Q.C. The question of jurisdiction has been determined by the Court of Appeal in *Banque des Marchands de Moscou (Koupetschesky)* v. *Kindersley.*[1] The claim of the Crown to the assets of the company as bona vacantia is no ground for the refusal of a winding-up order: *In re Russian Bank for Foreign Trade.*[2] The Crown's claim is defeasible on the making of a winding-up order: *Russian and English Bank and Florance Montefiore Guedalla* v. *Baring Brothers & Co. Ld.*[3] That was admitted in *In re Banque Industrielle de Moscou*[4] and was accepted in *In re Banque des Marchands de Moscou (Koupetschesky).*[5] If the Crown takes the assets as bona vacantia it undoubtedly takes them subject to the present debts of the company: *In re Belmont & Co. Ld.*[6]

---

[1] [1951] Ch. 112; 66 T.L.R. (Pt. 2) 654; [1950] 2 All E.R. 549.

[2] [1933] Ch. 745; 49 T.L.R. 253.

[3] [1936] A.C. 405; 52 T.L.R. 393; [1936] 1 All E.R. 505.

[4] [1952] Ch. 919; [1952] 2 T.L.R. 406; [1952] 2 All E.R. 532.

If the Crown is entitled in every case to bona vacantia, there is no meaning in the Companies Act as regards the winding up of a dissolved foreign company. Thirty years have passed since the dissolution and the Crown has not taken any step with regard to the assets. A winding-up order would provide the machinery for getting in the assets and paying the debts. Litigation abroad does not prevent the making of a winding-up order abroad. A winding-up order would only relate to the distribution of assets. [Reference was made to section 404 of the Act of 1948, and to *In re Blackburn Philanthropic Assurance Co. Ld.*[7] and *In re Tovarishestvo Manufactur Liudvig-Rabenek.*[8]] The petitioners have a right, as creditors, to a winding-up order, assuming that the court has jurisdiction to make it.

Sir Reginald Manningham-Buller Q.C., S.-G. Here there is no evidence that this company carried on business anywhere. The Crown relies on *In re Tovarishestvo Manufactur Liudvig-Rabenek* [8] to show that, in the winding-up proceedings relating to foreign companies, the jurisdiction of the court is limited to cases where the foreign corporation has carried on business in this country [9]: see also *Russian and English Bank and Florance Montefiore Guedalla* v. *Baring Brothers & Co. Ld.*[10] A second line of argument is that the assets of the company become the property of the Crown as soon as the property ceases to have an owner. There is no jurisdiction to make an order without the Crown's consent. Applications under section 352 of the Companies Act, 1948, are always made after notice to the Treasury Solicitor and Attorney-General; and the Attorney-General is a party to the proceedings: *In re Belmont & Co. Ld.*[11] [*In re Home and Colonial Insurance Co. Ld.*[12] and *In re Higginson and Dean* [13] were also referred to.]

The Crown is an interested party and the property belongs to the Crown. The authorities show that where, as in the present case, the Crown does not waive its right to bona vacantia, there are no assets to be administered. Where, however, the Crown waives its claim, a winding-up order can be made and the ownership of the property can be transferred to the company concerned: see *Russian and English Bank and Florance Montefiore Guedalla* v. *Baring Brothers & Co. Ld.*[14] The mere making of a winding-up order defeats the Crown's title, whether or not the Crown consents to such an order being made. If the Crown consents, it is abandoning its claim to bona vacantia. If the Crown objects, the objection cannot be overruled, unless there is an express power or a necessary implication in the statute. [Reference was made to *Boarland (Inspector of Taxes)* v. *Madras Electric Supply Corporation*[15] and *Bank voor Handel en Scheepvaart N.V.* v. *Slatford.*[16]] The Crown's rights to bona vacantia are not prejudiced by sections 399 and 400 of the Act of 1948. There is no intention, either express or implied, in those sections that those rights should be prejudiced. If a winding-up order were made, the effect would be to prevent British creditors from obtaining an ex gratia payment from the Crown.

---

[5] [1952] W.N. 151; [1952] 1 T.L.R. 739; [1952] 1 All E.R. 1269.

[6] [1952] Ch. 10; [1951] 2 T.L.R. 925; [1951] 2 All E.R. 898.

[7] [1914] 2 Ch. 430.

[8] [1944] Ch. 404; 60 T.L.R. 467; [1944] 2 All E.R. 556.

[9] [1944] Ch. 404, 413.

[10] [1936] A.C. 405; 52 T.L.R. 393; [1936] 1 All E.R. 505.

[11] [1952] Ch. 10.

[12] (1928) 44 T.L.R. 718.

[13] [1899] 1 Q.B. 325; 15 T.L.R. 135.

Lindon Q.C. There is ample evidence that the Russian bank was carrying on business in this country. To found jurisdiction to make an order it is not necessary to show precisely a carrying on of business. [Reference was made to *In re Dendre Valley Railway and Canal Co.*[17] and *In re Union Bank of Calcutta.*[18]] It is a question of evidence. The visits of officials of the company to this country may be sufficient for it to be held that business is being carried on here. *In re Russian and English Bank*[19] is distinguishable. In that case it was suggested that, if there was no business being carried on, there was no jurisdiction to wind up a company. [Reference was also made to *In re Matheson Brothers Ld.*[20] and *In re Kloebe.*[21]] Section 399 (5) is wide in its terms. Therefore there is jurisdiction to wind up the company on evidence that it has been dissolved. [Reference was made to *In re Crigglestone Coal Co. Ld.*[22] and *In re Airedale Co-operative Worsted Manufacturing Society Ld.*[23]]

The prerogative of the Crown with regard to winding up is cut down by the Act of 1948: see *Attorney-General* v. *De Keyser's*

---

[14] [1936] A.C. 405, 426, 434, 439.

[15] [1953] 1 W.L.R. 920; [1953] 2 All E.R. 467.

[16] [1953] 1 Q.B. 248; [1951] 2 T.L.R. 755; [1951] 2 All E.R. 779.

[17] (1850) 19 L.J.Ch. 474.

[18] (1850) 3 De G. & Sm. 253.

[19] [1932] 1 Ch. 663; 48 T.L.R. 282.

[20] (1884) 27 Ch.D. 225.

[21] (1884) 28 Ch.D. 175; 1 T.L.R. 139.

[22] [1906] 2 Ch. 327; 22 T.L.R. 585.

[23] [1933] Ch. 639; 49 T.L.R. 365.

Royal Hotel Ld.,[24] *In re H. J. Webb & Co. (Smithfield, London) Ld.*[25] and *Food Controller* v. *Cork.*[26] The Crown is not a proper party and has no right to oppose the petition. A petition is not an action; it is a procedure to secure the distribution of a fund among creditors: see *In re Sir Thomas Spencer Wells* [27] and *In re A Company.*[28]

The Statutes of Limitation do not apply against a creditor of a dissolved company between the date of its dissolution and the date of a winding-up order: see *In re Russo-Asiatic Bank.*[29]

As to jurisdiction, the court has an absolute and unfettered jurisdiction on the wording of section 399: see *Banque des Marchands de Moscou (Koupetschesky)* v. *Kindersley.*[30] It is unnecessary, as a foundation for a winding-up order, to prove that the bank had any branch or office in England: *In re Lloyd Generale Italiano.*[31] In *In re Naamlooze Vennootschap Handelmaatschappij Wokar* [32] it was decided that the pendency of a foreign liquidation does not interfere with the jurisdiction of this court to make a winding-up order.

The winding-up order should be made. Not only will no one be prejudiced, but the reverse will be the case because the Crown's right to bona vacantia is preserved by section 354.

[*Lionel Edwards Q.C.* and *J. P. Warner*, for one Kaplan, proposed to submit an argument on his behalf; he wished to oppose the petition. His Lordship refused to allow this argument to be submitted, and said that he was satisfied that the interests of their client would not be affected in the event of a winding-up order being made.]

The following cases were also referred to in argument: *Employers' Liability Assurance Corporation* v. *Sedgwick, Collins & Co.*[33]; *In re English, Scottish and Australian Chartered Bank* [34]; *Dynamit Actien-Gesellschaft* v. *Rio Tinto Co.*[35]; *Grell* v. *Levy* [36]; *In re Bradford Navigation Co.*[37]; *In re Henley & Co.*[38]; *New South Wales Taxation Commissioners* v. *Palmer* [39]; *Lazard Brothers* v.

---

[24] [1920] A.C. 508; 36 T.L.R. 600.

[25] [1922] 2 Ch. 369; 38 T.L.R. 579.

[26] [1923] A.C. 647; 39 T.L.R. 699.

[27] [1933] Ch. 29; 48 T.L.R. 617.

[28] [1915] 1 Ch. 520; 31 T.L.R. 241.

[29] [1934] Ch. 720.

[30] [1951] Ch. 112.

[31] (1885) 29 Ch.D. 219.

[32] [1946] Ch. 98; 62 T.L.R. 95.

[33] [1927] A.C. 95; 42 T.L.R. 749.

[34] [1893] 3 Ch. 385.

[35] [1918] A.C. 260.

[36] (1864) 16 C.B.N.S. 73.

[37] (1870) L.R. 5 Ch. 600.

[38] (1878) 9 Ch.D. 469.

[39] [1907] A.C. 179; 23 T.L.R. 304.

Banque Industrielle de Moscou[40]; *In re Oriental Bank Corporation,*[41] and *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse.*[42]

Cur. adv. vult.

March 10. WYNN-PARRY J. This is a petition for the compulsory winding up of Azoff-Don Commercial Bank, to which I shall refer as the company. The company was established in the year 1871 under the laws of the Empire of Russia by royal charter as a joint stock company with limited liability. I am satisfied from the evidence that by the end of the year 1922, at the latest, the company had been dissolved under the laws of the Union of Soviet Socialist Republics.

The company carried on business as bankers and generally transacted all kinds of financial and mercantile business, including the investment of moneys. The company's head office and principal place of business was at Petrograd, and it had various branch offices in Russia. According to the evidence filed in respect of the petition, the company never had an office or place of business in England, nor were particulars of the company registered under section 35 of the Companies Act, 1907, or section 274 of the Companies (Consolidation) Act, 1908, or under any of the substituted statutory provisions.

So far as material, paragraphs 5, 6 and 7 of the petition read as follows: "5. The company also carried on business and "entered into mercantile transactions and arrangements with "persons and corporations outside Russia and in particular pro-"vided for or arranged the provision of mercantile credits and "banking facilities in England, Norway, Denmark, Belgium and "elsewhere. 6. In the course of its business the company "acquired and at all material times had and still has substantial "assets in England. In particular the company was for many "years a customer of Hambros Bank Ld. The company had "current or other accounts in pounds sterling with Hambros, into "which the company paid or transferred or caused to be paid or "transferred considerable sums of money in pounds sterling. "Your petitioners believe that as a result Hambros held in "December, 1947, and still hold substantial sums, the amount "of which your petitioners have been unable to ascertain, on "behalf of and for the account of the company being the credit

---

[40] [1932] 1 K.B. 617; 49 T.L.R. 94.

[41] (1888) 54 L.J.Ch. 481; 1 T.L.R. 273.

[42] [1925] A.C. 112; 40 T.L.R. 837.

"balance in favour of the company of its said accounts. 7. The "company acquired prior to December, 1917, a number of shares "in the capital of Hambros. There is now standing registered "in the name of the company in the register of members of "Hambros 9,916 shares of £10 each in the capital of Hambros "all of which said shares are paid up to the extent of £2 10s. 0d. "each and of which 8,500 had been allotted to the company by "Hambros for cash prior to December, 1917."

The petitioners are five Norwegian banks, who, in the circumstances set out in the petition, are creditors of the company for 5,944,393 Norwegian kroner, the sterling equivalent of which is said to be £297,545. The petition asks for the order to be made under section 399 (5) (*a*) of the Companies Act, 1948.

The petition is opposed by the Crown and by one Kaplan, who first gave notice to support the petition. I will deal first with the position of Kaplan. In my view he has no locus standi to be heard. He claims that as a result of an agreement between him and the liquidator in bankruptcy proceedings taken against the company in France, which agreement has been sanctioned by the competent French court, the liquidator has assigned to him all the assets of the company held by Hambros Bank Ld., including, as I understand his claim, the shares of Hambros Bank registered in the name of the company. In his notice of opposition Kaplan stated that he was a creditor for £2,300. He filed no evidence to support the statement, and Mr. Edwards, who appeared for him, was constrained to admit that he could not assert Kaplan's position as a creditor. Mr. Edwards contended that Kaplan was a contributory and could be heard as such. I refused to allow Mr. Edwards to develop this submission. His object in making it was, as he frankly admitted, merely to establish a right to be heard. But, if he established that right, he then intended to assert that Kaplan was entitled in the circumstances above mentioned to the whole of the known assets in England. Such a claim, however, apart from the difficulties (almost insuperable) of attempting to adjudicate on it in these proceedings, was clearly wholly inconsistent with his claim to be interested in these assets as a contributory. It is a claim outside any liquidation and will therefore be unaffected if I should make a winding-up order.

The Crown opposes the petition on three grounds, which can be shortly stated. First, it is said that, on the company becoming dissolved in Russia by the year 1922 at the latest, the assets became vested in the Crown as bona vacantia; that therefore the court has no jurisdiction to wind up the company unless the Crown consents; the Crown does not consent and therefore the court cannot make a winding-up order. Secondly, the Crown contends that to ground jurisdiction in the court to wind up a foreign company which has been dissolved by the law of the country of its incorporation it is necessary to show that the company has carried on business in this country. The presence of assets, however valuable, is not sufficient. The company never carried on business in this country and therefore I cannot make the winding-up order. Thirdly, the Crown contends that even if there is jurisdiction to do so I should not make a winding-up order at the suit of foreign creditors in respect of debts payable in Norway in Norwegian kroner, but that I should leave the Crown to get in the English assets with a view to the Crown being in a position to make ex gratia payments among English creditors in respect of rouble debts, which of course will be irrecoverable. I may observe that there is no evidence of the existence of any English creditors.

I will deal with those contentions in the order in which I have stated them. The first relevant question appears to me to be: to what extent has the Crown's prerogative been cut down by the Companies Act, 1948? It is clear that a statutory provision can cut down the prerogative of the Crown either expressly or by necessary implication: see *Attorney-General* v. *De Keyser's Royal Hotel Ld.*[1] In the course of his speech Lord Atkinson said[1]: " It is quite obvious that it would be useless and meaning-" less for the legislature to impose restrictions and limitations " upon, and to attach conditions to, the exercise by the Crown " of the powers conferred by a statute, if the Crown were free at " its pleasure to disregard these provisions, and by virtue of its " prerogative do the very thing the statutes empowered it to do. " One cannot in the construction of a statute attribute to the " legislature (in the absence of compelling words) an intention " so absurd. It was suggested that when a statute is passed " empowering the Crown to do a certain thing which it might " theretofore have done by virtue of its prerogative, the preroga-" tive is merged in the statute. I confess I do not think the " word ' merged ' is happily chosen. I should prefer to say that " when such a statute, expressing the will and intention of the " King and of the three estates of the realm, is passed, it abridges " the royal prerogative while it is in force to this extent: that the " Crown can only do the particular thing under and in accordance

---

[1] [1920] A.C. 508, 539.

"with the statutory provisions, and that its prerogative power to "do that thing is in abeyance. Whichever mode of expression "be used, the result intended to be indicated is, I think, the "same—namely, that after the statute has been passed, and "while it is in force, the thing it empowers the Crown to do can "thenceforth only be done by and under the statute, and subject "to all the limitations, restrictions and conditions by it imposed, "however unrestricted the royal prerogative may theretofore have "been."

Lord Sumner is reported as saying [2]: "The legislature, by "appropriate enactment, can deal with such a subject-matter as "that now in question in such a way as to abate such portions of "the prerogative as apply to it. It seems also to be obvious that "enactments may have this effect, provided they directly deal "with the subject-matter, even though they enact a modus "operandi for securing the desired result, which is not the same "as that of the prerogative. If a statute merely recorded existing "inherent powers, nothing would be gained by the enactment, "for nothing would be added to the existing law. There is no "object in dealing by statute with the same subject-matter as is "already dealt with by the prerogative, unless it be either to "limit or at least to vary its exercise, or to provide an additional "mode of attaining the same object."

Lord Parmoor is reported as saying [3]: "The principles of con"struction to be applied in deciding whether the royal prerogative "has been taken away or abridged are well ascertained. It may "be taken away or abridged by express words, by necessary "implication, or, as stated in Bacon's Abridgement, where an "Act of Parliament is made for the public good, the advance"ment of religion and justice, and to prevent injury and wrong." Later he said: " I am further of opinion that where a matter "has been directly regulated by statute there is a necessary "implication that the statutory regulation must be obeyed, and "that as far as such regulation is inconsistent with the claim of a "royal prerogative right, such right can no longer be enforced."

It is against the background provided by those passages that the Companies Act, 1948, has to be construed. The Crown's right to property as bona vacantia is expressly mentioned in section 354. That is the only section where it is mentioned. Prima facie, therefore, on the reasoning of the House of Lords in *Attorney-General* v. *De Keyser's Royal Hotel Ld.*,[4] that right of the Crown is exhaustively stated in that section. In my opinion, examination of other sections of the Act confirms this view. In the first place, there is no mention in either section 399 or section 400 of any such limitation on the jurisdiction of the court as that contended for. Secondly, on the presentation of a petition under either of those sections, section 404 operates and makes applicable the provisions of Part V of the Act with certain immaterial exceptions: see *Rudow* v. *Great Britain Mutual Life Assurance Society.*[5] It follows that to the winding up of such a company as this section 319 of the Companies Act, 1948, would apply; but it has been held that the effect of section 209 of the Companies (Consolidation) Act, 1908, the section corresponding to section 319 of the Companies Act, 1948, is to cut down or limit the prerogative of the Crown: see *In re H. J. Webb & Co. (Smithfield, London) Ld.*[6]; affirmed sub nomine *Food Controller* v. *Cork.*[7]

---

[2] [1920] A.C. 508, 561.

[3] Ibid. 576.

[4] [1920] A.C. 508.

It is sufficient, I think, to refer to two short passages, the first from the speech of Lord Shaw of Dunfermline and the second from that of Lord Wrenbury. Lord Shaw said [7]: "The Crown, "as a creditor, is by its assent to this legislation plainly restricted "in priority to the limited specification of Crown debts given. It "follows that, beyond that point, the Crown assents to an equal "division. Any super-eminent right, whether under the name of "prerogative or otherwise, has disappeared. The Crown stands "plainly bound to that result." Lord Wrenbury said [8]: "The "second observation is that section 209 as affecting the rights of "the Crown in respect of Crown debts is binding on the Crown. "By assenting to an Act which affected the rights of the Crown "it is obvious that the Crown waived its prerogative to the extent "necessary to give effect to the Act so long as the Act was in "operation. The third observation is that as section 209 binds "the Crown, section 186, which deals with the same subject-"matter—namely, the application of the assets in satisfying the "liabilities—also binds the Crown."

It is thus clear that by the Companies Act, 1948, the extent of the Crown's prerogative is cut down by necessary implication as well as expressly by the joint effect of sections 353 and 354. Once it is shown, as in my view I have shown, that a section in Part V of the Act cuts down the Crown's prerogative by necessary implication, it follows that every other applicable section of that part has the same operation if that result is necessary to its effective working.

[5] (1881) 17 Ch.D. 600.

[6] [1922] 2 Ch. 369.

[7] [1923] A.C. 647, 665.

[8] Ibid. 669.

The main object of winding up a company is to procure the realization of its assets and their distribution among its creditors, including the Crown. On this basis, is it straining the language of the Act to place on its provisions a construction which, as regards such a company as this, will result in that object being achieved? In my view, authority is in favour of this construction. In the course of his judgment in *In re Wells* [9] Lawrence L.J. said: "The right of the Crown to succeed to the personal estate vested "in a company at the time of its dissolution does not in my "opinion differ in substance from the right of the Crown to "succeed to the personal estate of a person dying intestate with- "out next-of-kin. In both cases the title of the Crown arises "because the property has no other owner; such property must "not, of course, be confused with property the owner of which is "unknown. The old text-book writers on the law of corporations, "such as Kyd (1794), vol. ii, p. 516, and Grant (1850), p. 304, "expressed the opinion that the Crown is entitled to the personal "estate of a dissolved corporation and, so far as I know, the "correctness of that opinion has never been doubted. The only "difference between the case of an intestate and of a dissolved "company is purely one of form. In the case of an intestate, "his personal estate immediately on his death formerly vested in "the Ordinary, and now vests in the Probate judge pending the "grant of letters of administration. As the right of administra- "tion follows the right of property, letters of administration in "the case of an intestate dying without next-of-kin are granted "to the nominee of the Crown, but subject to the usual condition "of paying the administration expenses and debts of the intestate. "In the case of a dissolved company, the personal estate passes "directly to the Crown, and there is no necessity to provide for "the payment of any administration expenses or debts, as the "legislature has provided that these must be discharged before "the company is dissolved."

The position of such a company as this was exhaustively considered by the House of Lords in *Russian and English Bank* v. *Baring Brothers & Co. Ld.*[10] The conflict between the views of the members of the House who heard the appeal consisted in this, that the minority, Lord Russell and Lord Maugham, considered that it was the affairs of the dissolved company which were to be wound up, while the majority, Lord Blanesburgh, Lord Atkin and Lord Macmillan, considered that it was the company which was to be wound up, the company being deemed for the limited purposes of the liquidation not to have ceased to exist.

---

[9] [1933] Ch. 29, 50.

[10] [1936] A.C. 405.

I quote from the speeches of the majority. Lord Blanesburgh said [11]: "Take a company described in subsection (2) of section "338. That company, although in terms stated to be non-existent "in the country of its incorporation, is not only a company which "may be wound up but, on an order for winding it up made, it is "by section 342 to be deemed to be a company under the Act, "not, be it observed, a 'dissolved' company under the Act: "there is, as Cotton L.J. observed, no such thing. Following "Sir George Jessel's terminology it is to be deemed to be a "registered company; adapting the phraseology of the Act already "alluded to and equivalent in effect, it is to be treated as if it "were a company which had not been dissolved. It is not denied "that it was within the competence of the legislature so to enact: "the only question is whether it has in substance done so. My "Lords, I cannot doubt that it has. The Act in regard to these "companies is dealing with organizations which, as such, are "beyond the control of Parliament. It is not for the legislature "of this country either to kill or to make them alive. In this "vital respect they stand in a totally different position from the "companies under the Act whose dissolution the Act has brought "about and whose dissolution it may qualify as in section 205 (5), "or may, as it has done, declare to have been void. But all that "with reference to the dissolution of a foreign corporation the "legislature can effectively say is that it shall be ignored in "a winding-up of the company under its own Act. And it is "ignored for the reason that any dissolution without a winding-up "previously completed and with creditors unpaid is an offence, "an injustice, to these creditors if it be permitted to defeat their "claims against the company. Therefore such a dissolution is "to be ignored. And reading sections 338 (2) and 342 together "I cannot doubt that in express terms the legislature has said "that the dissolution shall be ignored in that case—creating a "situation the full benefit of which can be extended to the "liquidation of the bank as a dissolved foreign corporation: "thus rescuing from sterility a winding-up by statute directly "authorized."

In the course of his speech Lord Atkin said [12]: "The liquidator "deals with the company's property in right of the company or "usually in the name of the company, possessing the powers of

---

[11] [1936] A.C. 405, 421.

[12] Ibid. 426.

1954

AZOFF-DON COMMERCIAL BANK, *In re.*

Wynn-Parry J.

"the directors and the special statutory powers given to him by "the Act. On the assumption adopted by the judgments under "appeal not only is there no property of the company in existence, with the result that none of the statutory powers of the "liquidator in respect of property comes into existence, but there "is the further difficulty that all that which had been the movable "property of the company has become vested in the Crown as "bona vacantia. For some reason which I cannot appreciate "some of the learned judges in the courts below seem to have "thought that this obvious difficulty might be cured by obtaining "a vesting order under section 190. But when that section is "looked at the power of the court is found to be to 'direct that all "'or any part of the property of whatsoever description belonging "'to the company . . . shall vest in the liquidator by his official "'name.' The initial futility remains. 1. There is no property "belonging to the company. 2. What has been the property of "the company now belongs to a third person, the Crown, and "there is no power to vest the property of a third person in the "liquidator. The result is that if the company for the purposes "of winding-up is to be treated as dissolved there never can be "any assets over which the liquidator can exercise any powers "of any kind. On the assumption I prefer to adopt the Crown "acquired a defeasible title defeated upon the making of a "winding-up order."

Finally, Lord Macmillan said [13]: "Be that as it may, it is "manifest that the legislature has not been deterred by the fact "that a company has ceased to exist from authorizing it to be "wound up. Now the purpose of pronouncing a winding-up order "is to secure the collection and distribution of the assets of the "company to which it relates. The logical inquirer may ask how "a company which has ceased to exist can have any assets. But "when the legislature authorized the making of a winding-up "order in the case of a dissolved company it must be presumed "to have intended such order to be effective and to result in the "collection and distribution of assets. To hold that the legislature has authorized the collection of the assets of a dissolved "company, but has withheld the power of recovering these assets, "would be to attribute a singular ineptitude to Parliament."

The burden of those passages is, I think, that it must never be forgotten that the statutory provision of the application of the winding-up provisions of the Companies Act to a foreign corporation which has been dissolved under the law of the country of its

---

[13] [1936] A.C. 405, 437.

1954

AZOFF-DON COMMERCIAL BANK, *In re.*

Wynn-Parry J.

incorporation is made with a view to something effective being achieved, namely, the collection of its assets and their distribution among the creditors, and it is no doubt for this reason that it appears to be accepted, as I shall show later in this judgment, that the court will not exercise its jurisdiction to wind up such a company if it has no assets within the jurisdiction. If the contention of the Crown were correct it must follow that a most far-reaching limitation must be placed on the plain language of sections 399 and 400 of the Companies Act, 1948, for the justification of which the whole Act can be searched in vain. The result must be that the two sections are to be regarded as a dead letter except on such occasions as the Crown allows them to have any force, a curious form of legislation.

The truth is that if the Crown's contention is correct the Act does not work, whereas if that contention is rejected it does work; a complete system of administration is applied to the company's affairs and at the end of the administration any surplus goes to the Crown as bona vacantia under section 354, where and where only the Crown's right to property as bona vacantia is mentioned. In my judgment, therefore, the highest title which the Crown can claim to the property of the company in this country is a defeasible title liable, as Lord Atkin said, to be defeated by the winding-up order. It is a title which is liable to be defeated without its consent and even against its wish in every case where the conditions prescribed by the Act as interpreted by the relevant authorities exist.

I turn now to the second ground on which the Crown opposes the petition, namely, that in the case of a foreign dissolved corporation it is a condition for grounding jurisdiction in the court to wind it up that it should be shown that the corporation had at some time before its dissolution carried on business in this country, and that it has not been shown that the company did so. I think that this point is covered by the decision of the Court of Appeal in the recent case of *Banque des Marchands de Moscou (Koupetschesky)* v. *Kindersley.*[14] Three points were decided. The first dealt with the ground on which Harman J. had dismissed the summons. This point has no materiality for my present purpose. The second point decided was that if proof of conduct of business entered into by the bank was necessary to the existence of jurisdiction in the English courts to wind up the bank under the Companies Act, 1929, s. 338 (1) (*d*) (i), that condition was satisfied on the evidence. The third point decided was (I read from the headnote): "That in the case of a foreign corporation (such "as the bank) which had been dissolved and extinguished in the "country in which it was established, it was not necessary as a "statutory condition of jurisdiction in the English courts to wind "them up to prove that they had, before their dissolution, "established at some place in England a branch or other business "place, and that that business had ceased: it was sufficient "that there were assets of the bank in this country, and persons "here claiming as creditors of the bank or said to be indebted to "it, as being indicia of a business in some sense formerly "conducted here."

---

[14] [1951] Ch. 112.

Having dealt with the first point, Evershed M.R., whose judgment was the judgment of the court, said this[15]: "But I "agree with Harman J. that in the case of a foreign corporation, "such as the bank, which has, ex hypothesi, been dissolved and "extinguished in the country where it was established, it is not "necessary, as a statutory condition of jurisdiction in the English "courts to wind it up, to prove that it had, before its dissolution, "established at some place in England a branch or other business "and that that business had ceased."

Evershed M.R. then proceeded to consider the scope of and jurisdiction conferred by section 338 (1) (*d*) (i) of the Companies Act, 1929, without regard to the effect of subsection (2). He said[16]: "Subsection (1) (*d*) (i) of section 338 of the Act of 1929 "provided as follows: 'The circumstances in which an unregis-"'tered company may be wound up are as follows:—(i) if the "'company is dissolved, or has ceased to carry on business, or "'is carrying on business only for the purpose of winding up its "'affairs.' This form of words is substantially identical with "that which has consistently appeared in all the relevant legisla-"tion since the Act of 1848 (11 & 12 Vict. c. 45). As a matter "of language, it is plain that the three conditions named are "independent and not cumulative. Assuming, therefore, in the "case of a foreign corporation which has by its local law been "extinguished, that it is covered by the words 'is dissolved'—"which words must, as it is conceded, be taken to mean 'has been "'dissolved'—it would appear from the language used that no "other condition has to be fulfilled in order to confer upon the "English court jurisdiction to wind it up. As a matter of general "principle, our courts would not assume, and Parliament should "not to be taken to have intended to confer, jurisdiction over

---

[15] [1951] Ch. 112, 125.

[16] Ibid.

"matters which naturally and properly lie within the competence "of the courts of other countries. There must be assets here to "administer and persons subject, or at least submitting, to the "jurisdiction who are concerned or interested in the proper distribution of the assets. And when these conditions are present the "exercise of the jurisdiction remains discretionary."

Pausing there, it is, I think, clear that it is the considered view of the Court of Appeal that for the purpose of grounding jurisdiction in the court under section 338 (1) (*d*) (i) of the Companies Act, 1929, it is not necessary to show that the dissolved corporation has carried on a business in this country. The Master of the Rolls then proceeded to discuss the circumstances in which the court will exercise its discretionary jurisdiction. He continued: "Prima facie if the local law of the dissolved "foreign corporation provided for the due administration of all "the property and assets of the corporation wherever situate "among the persons properly entitled to participate therein, the "case would not be one for interference by the machinery of the "English courts. In the present case there are substantial assets "standing in the name of the bank or its liquidator, and there are "persons within the jurisdiction having claims to participate in "the distribution of those assets. At the same time, by reason "of the total extinction in Russia of the bank and the absence "of any machinery under Russian law for the due distribution "of the assets among the persons regarded as properly having "claims upon them, there would be, unless the machinery of "winding up under the Companies Act is available, no means of "any kind existing for the administration of the English assets. "The existence of assets here, the presence here of persons "claiming as creditors of the bank or said to be indebted to them, "seem to constitute at least the indicia of a business in some "sense formerly conducted here. Where, therefore, the circum"stances exist which, upon the general principle above referred "to would make the case appropriate for the exercise by our "court of its winding-up jurisdiction, it would appear that the "question whether the foreign corporation carried on business in "this country would generally be academic, unless it is also "necessary to show that that business was carried on directly "and from some established or specified place or places in this "country."

That passage indicates that in order to justify the exercise by the court of its discretionary jurisdiction it is enough to show the existence of assets here and the presence here of persons claiming as creditors of the bank or said to be indebted to them; those circumstances being treated as constituting "at least indicia of "some business formerly conducted here," subject to the proviso: "unless it is also necessary to show that that business was carried "on directly and from some established . . . place or places in "this country." His Lordship then proceeded to deal with the relevant authorities and his conclusion was that it was not necessary so to show.

Having therefore established the scope and extent of the jurisdiction under section 338 (1) (*d*) (i) of the Companies Act, 1929, and the requirements for the exercise of that discretionary jurisdiction, Evershed M.R. proceeded to consider whether or not subsection (2) of the section had the effect of placing any limit on the jurisdiction under subsection (1). After an exhaustive consideration of the matter he stated his conclusion as follows [17]: "In the light of the judicial pronouncements to which I have "referred in the House of Lords, and also those of Cohen and "Bennett JJ., Parliament re-enacted in sections 399 and 400 of "the Companies Act, 1948, the exact language of subsections (1) "and (2) of section 338 of the Act of 1929. It follows in my "judgment that subsection (2) of section 338 must be regarded as "expository only and as not having been intended to give jurisdiction to wind up dissolved foreign corporations (such as the "plaintiff bank) subject to special limiting conditions not applicable to the more general jurisdiction conferred by subsection (1), "and that by the opening words in subsection (2), 'where a "'company incorporated outside Great Britain which has been "'carrying on a business in Great Britain . . .', is intended "(subject to the suggestion of Jenkins L.J.) no more than a "reference to the fact that some commercial subject-matter on "which a winding-up order can operate is a natural and necessary "requisite for the exercise of winding-up jurisdiction. In my "judgment, therefore, the language of subsection (2) does not "qualify the conclusion which I have reached on subsection (1)."

Finally, he stated what I take to be his general conclusions on this point: "I think, that in circumstances such as exist in the "present case, it is unnecessary as a foundation for a winding-up "order to prove that the bank had any branch or office in England or carried on their business operations in England from "some established or specific or identifiable place of business; "and that Eve J. had jurisdiction to make the order which he

---

[17] [1951] Ch. 112, 131.

1954

AZOFF-DON COMMERCIAL BANK, *In re.*

Wynn-Parry J.

" made in May, 1932, apart from the matter on which he " expressly relied."

In my view, therefore, that case is authority for the proposition that I have jurisdiction to make a winding-up order and that, further, I should be justified in exercising that jurisdiction if I can find on the evidence some commercial subject-matter on which a winding-up order can operate. In view of the evidence at paragraphs 5, 6 and 7 of the petition, to which I have already referred, I am satisfied that that condition is fulfilled.

As regards the third point taken by the Crown, which was described as relating to the merits, I can see no merit in the suggestion that I should refuse to make a winding-up order which will benefit the petitioners as foreign creditors, but that I should leave it to the Crown to make ex gratia payments to English creditors for rouble debts—as to the existence of which creditors there is, as I have said, no evidence—to the exclusion no doubt of the petitioners as mere foreign creditors notwithstanding that their debts are clearly established; a somewhat surprising proposition. The object of a winding-up order is to ensure distribution of the assets among the whole body of creditors. No other basis of distribution would be fair. As Pearson J. said in *In re Kloebe*[18]: " . . . but whatever the law in France or India may " be, the law of England has always been that you must enforce " claims in this country according to the practice and rules of " our courts, and according to them a creditor, whether from the " furthest north or the furthest south, is entitled to be paid " equally with other creditors in the same class. I must refuse " to alter that which has always been the law of this country, " and which I must say, for the sake of honesty, I hope will " always be the law of this country." I therefore make the usual compulsory order.

Solicitors: *McKenna & Co.; Barfield & Barfield; Treasury Solicitor.*

J. L. D.

---

[18] (1884) 28 Ch.D. 175, 180.

1954
Jan. 14, 15,
19, 20.

Roxburgh J.

In re CHURSTON SETTLED ESTATES.

[1953 C. 3624.]

Power of Appointment — General or special power — Joint power— Whether equivalent to joint property—Joint power to be exercised with consent of third party—Rule against perpetuities.
Rule against Perpetuities.

By a deed of resettlement of 1895 estates were settled on such trusts as A and B (during C's life with her written consent) should by deed jointly appoint. By a deed of 1898 A and B, exercising that power with C's written consent, appointed the property to such uses and on such trusts as A, B and C should by deed jointly appoint. In each deed there were further provisions in default of appointment.

The question arose whether appointments under the power of 1898 should be read back into the resettlement of 1895 for the purpose of applying the rule against perpetuities to the limitations which they purported to create:—

Held, first, that the joint power of appointment with a written consent in the deed of 1895 was a special power.

In re Watts [1931] 2 Ch. 302 followed; note in Key and Elphinstone's Precedents in Conveyancing, 14th ed., vol. 2, at p. 1049 disapproved.

Held, secondly, that the joint donees of the power of appointment in the deed of 1898 could not be treated as owners and that that power was wholly different from a general and absolute power; so that the deed of 1898 and limitations created thereunder were to be read back into the resettlement of 1895, and those limitations infringed the rule against perpetuities.

Dicta of James L.J. in *Attorney-General* v. *Charlton* (1877) 2 Ex.D. 398, at p. 412, and of Lord Selborne in *Charlton* v. *Attorney-General* (1879) 4 App.Cas. 427, at p. 446, considered and applied.

ADJOURNED SUMMONS.

By a deed of 1895 the Churston estates were resettled to such uses as Lord Churston the grandfather and his son John Reginald Lopes Yarde-Buller (hereinafter called "John") should by deed jointly appoint but during the grandmother's life only with her consent and in default of and subject to appointment to certain uses during the joint lives of the grandfather and John with remainder to John for life with remainder to John's first and other sons successively in tail male; and the trustees of the deed were appointed Settled Land Act trustees thereof. By a deed of 1898 the grandfather and John, in exercise of that joint power, with the grandmother's consent appointed the property to such uses and on such trusts as the grandfather, the grandmother and John should by deeds jointly appoint and in default of and subject to appointment as the grandmother and the survivor of the grandfather and John should by deeds jointly appoint and in default of and subject to appointment to certain uses during the lives of the grandfather, the grandmother and John with remainder to the uses in the deed of 1895 following the limitation to the use of John for life; and the trustees of the deed of 1895 were appointed Settled Land Act trustees thereof and of the compound settlement created by the two deeds.

In 1910 Lord Churston the grandfather died and John became Lord Churston and is hereinafter called the father. By a deed of 1923 the grandmother and the father in exercise of the power conferred by the deed of 1898 jointly appointed the property to such uses as they themselves should by deed jointly appoint and in default of appointment as the father and Sir Henry Yarde-Buller, should both survive the grandmother, should after her death by deeds appoint and in default of appointment to certain uses for a term of years and subject thereto to the use of the father for life. In 1924 the grandmother died.

By a vesting deed executed in 1926 by Sir Henry Yarde-Buller and the father the settled property comprised in the deeds of 1895, 1898 and 1923 was vested in the father in fee simple on the trusts and subject to the powers and provisions upon and subject to which they ought to be held. By a deed of 1927 the father and Sir Henry Yarde-Buller, in exercise of their power under the deed of 1923, appointed the settled estates as they, Montague Ellis and Cecil Montague Jacomb Ellis (hereinafter respectively called Montague and Cecil) (who were both alive at the date of the deed of 1895) should by deed jointly appoint and in default of and subject thereto as the father and the survivors and survivor of Sir Henry Yarde-Buller, Montague and Cecil should likewise jointly appoint and in default of and subject to appointment on the trusts and subject to the powers and provisions upon and subject to which they were held immediately before the execution of the deed of 1927 except the joint power of appointment of the father and Sir Henry Yarde-Buller under the deed of 1923. In 1928 Sir Henry Yarde-Buller died.

By a deed poll of 1930 the father, Montague and Cecil, in exercise of their joint power under the deed of 1927, appointed that the settled property should from and after the father's death be held on such trusts as his son Richard Francis Roger Yarde-Buller and Montague and Cecil should by deed jointly appoint and in default of and subject to appointment as Richard and the survivor of Montague and Cecil should likewise jointly appoint and in default of and subject to appointment in trust for Richard for life and after his death for his first and other sons successively in tail male with remainder as therein mentioned to the father's second son with power to Richard and that son to charge for portions for younger children.

In 1930 the father died and Richard became and is hereinafter called Lord Churston. By a vesting assent of 1931 the settled estates were vested in Lord Churston in fee simple on the trusts and subject to the powers and provisions upon and subject to which they ought to be held. In 1932 he executed a charge whereby in the view of the trustees of the settlement he forfeited his life interest under the deed of 1930 and since then they had paid the income to him. By an appointment of 1933 made in consideration of his marriage he created trusts to raise portions for younger children. By an appointment of 1940 Lord Churston, Montague and Cecil, in exercise of their joint power of appointment under the deed of 1930, appointed that the settled property should be held on the trusts of the deed of 1930 but so that there should be substituted for the trusts therein declared to take effect after Lord Churston's death trusts to hold the property as Montague, Cecil and Alastair Urquhart should after Lord Churston's death and during his son's minority appoint and in default of appointment for his son for life and after the son's death for his first and other sons in tail male with remainders over. In 1942 Cecil died.

By an appointment of 1942 Lord Churston and Montague, in exercise of their joint power under the deed of 1930, appointed that the settled estates should be held as Lord Churston and four nominated persons (of whom Montague and Alastair Urquhart were two) should by deed jointly appoint and in default of and subject to appointment as Lord Churston and the three survivors of the nominated persons should jointly appoint and in default of and subject to appointment as Lord Churston and the two survivors of them should appoint and in default of and subject to appointment as he and the last survivor of them should appoint, subject to the powers and provisions in the deed of 1930 as modified by the appointment of 1940 and so that after the execution of the appointment of 1942 the joint power of appointment in the deed of 1930 should no longer be exercisable. In 1948 Montague and in 1949 another of the nominated persons died.

Doubts arose whether, for the purpose of the rule against perpetuities, the power of appointment in the deed of 1895 was general or special and whether the deed of 1930 or any later deed cut down or prejudicially affected the estate in tail male limited (in the events which happened) to Lord Churston by the deed of 1895. In 1953, by a disentailing assurance, he assigned to the Settled Land Act trustees of the deeds of 1895, 1898 and 1930 the property to which he was entitled under that of 1895 or any disposition to the uses or the trusts thereof for any interest in tail, to hold to them in fee simple subject to all charges and incumbrances prior to his entailed interests but discharged from all his entailed interests and so subject and so discharged in trust for him in fee simple.

On August 6, 1953, the plaintiffs took out this summons, to which the defendants were Lord Churston, his infant son the tenant for life in remainder and Eric John Wykeham Ellis, Alastair Urquhart and Rowland Marriott, who was one of the nominated persons. The defendant Ellis had succeeded the one who died in 1949.

By the summons the plaintiffs asked (1) whether, on the true construction of the resettlement and in the events which had happened, the settled estates were at the date of the summons held (subject to certain prior charges and incumbrances) (*a*) on such trusts and in such manner generally as Lord Churston and the defendants Ellis, Urquhart and Marriott should by deed jointly appoint and in default of and subject to such appointment on trust for Lord Churston during his life or until forfeiture and after his death on trust for his son during his life or until forfeiture with divers remainders over; or (*b*) on trust for Lord Churston for a beneficial and indefeasible estate in fee simple in possession; or (*c*) on some other and if so what trusts.

J. V. Nesbitt for the trustees.

Charles Russell Q.C. and *E. I. Goulding* for Lord Churston. The settled estates are held on trust for Lord Churston for a beneficial and indefeasible estate in fee simple in possession. Joint donees of a general power of appointment are not to be regarded as owners of the property over which the power is given. The courts have recognized the difference between an individual having an absolute power of disposition and two people jointly, or one with another's consent, or more than one with another's consent, having a power of disposition: see dictum of James L.J. in *Attorney-General* v. *Charlton* [1] and of Lord Selborne in *Charlton*

---

[1] (1877) 2 Ex.D. 398, 412.

v. *Attorney-General.*[2] Also, *In re Watts*[3] is an express decision that a power of appointment with consent is, for purposes of the rule against perpetuities, not to be treated as an exception. That case, in which the power was held to be a special power, is binding on the court and covers the present case, in which the power is a power to appoint by consent. The joint donees of the power in the deed of 1898 are not owners of the property. That power is a special power and the deed of 1898 and the limitations under it have to be read back into the deed of 1895 and the rule against perpetuities has been infringed.

E. Milner Holland Q.C. and *G. C. Dunbar* for the infant son, the tenant for life in remainder. The settled estates are now held, in default of and subject to any joint appointment by Lord Churston and the remaining defendants, in trust for Lord Churston for life and after his death for the infant son for life with remainders over. If a power of appointment enables the donee or donees to appoint to anyone in the world, including themselves or one of themselves, it is properly to be called a general power. An exercise of such a power in favour of persons other than the donee or donees is, in effect, a disposition by the donee or donees and not by the donor, because the donee or donees could have appointed to himself or themselves. It is logical that, where the settlor has limited the class of persons in whose favour the power may be exercised, the trusts created by the appointment should be referred back to the settlor's instrument; but it is not logical that those trusts should so be referred back where the settlor has given complete freedom of choice in the selection of objects; and, for the purpose of the rule against perpetuities, it is not necessary to show that the donee or donees of the power is or are in exactly the same position as absolute owners. In the present case the crux of the matter for the purposes of the rule against perpetuities is that a power is properly to be called a general power if it enables the donee to appoint to anyone in the world: Jarman on Wills, 8th ed. (1951), vol. 2, p. 788, Sugden on Powers, 8th ed. (1861), p. 394, and Farwell on Powers, 3rd ed. (1916), p. 8. There, in Jarman, Sugden and Farwell are three authoritative statements in support of that view. It is not necessary for the donee of a general power to have absolute dominion in the sense that he or she can dispose of the property. [Vaizey on Settlements (1887), p. 1080, was referred to.] The limitations under the deed of 1898 need not be read back into the resettlement of 1895 and do not infringe the rule against perpetuities: *In re Flower*[4]; *Stuart* v. *Babington.*[5] If the court holds that that contention is wrong, and that they do infringe that rule, it will follow that precedent 46 in Davidson's Precedents in Conveyancing, 3rd ed. (1873), vol. 3, Part 2, at p. 1281, also infringes it.

---

[2] (1879) 4 App.Cas. 427, 446.

[3] [1931] 2 Ch. 302.

Even assuming that *In re Watts*[6] is quite inescapable with regard to the power in the resettlement of 1895, which is not conceded, so far as it goes it is not an authority binding on the court on the question whether a power is general or special. That case distinguished *In re Dilke*[7] and *In re Phillips*,[8] in neither of which was the point which is before the court in the present case being considered.

There is a distinction between a power to A to appoint with the consent of B and a power to A and B jointly to appoint. The first is a power to appoint only with the consent of someone who is not a donee of the power; the second a power to appoint, admittedly jointly, but without the consent of anyone at all. Mr. Farrer, in his note in Key & Elphinstone's Precedents in Conveyancing, 14th ed., vol. 2, at p. 1049, seems to take the view that *In re Dilke*[9] and *In re Phillips*[10] stood as decisions on the matter before Bennett J.'s judgment in *In re Watts*[11] distinguishing them from that case. *Charlton* v. *Attorney-General*[12] does not deal with the point now before the court; and *In re Watts*[13] should not be taken as binding the court to hold that the power in the deed of 1898 is a special power.

Michael Fox for all other defendants.

Charles Russell Q.C. and *E. I. Goulding* in reply. The joint power in the deed of 1898 was not given to enable the donees to make the property their own. It was given to make it possible to deal with the settlement from time to time as circumstances should require: see the dictum of James L.J. in *Attorney-General* v. *Charlton*[14]; and in fact that is the sole purpose for which it has ever been exercised. If, in such a case as this, the donees of a joint power do appoint to themselves, the results are not the same as those of the appointment here. The purpose of this kind of joint power is exactly as described by James L.J., the whole intention being that it shall not be used at all in any way beneficial to the donees. It must be conceded that if the contentions for Lord Churston are correct, the precedent in Davidson is wrong. *In re Watts*[15] is not only indistinguishable from the present case but is a correct decision and in principle the court is bound to follow it.

---

[4] (1885) 55 L.J.Ch. 200.
[5] (1891) 27 L.R.Ir. 551.
[6] [1931] 2 Ch. 302.
[7] [1921] 1 Ch. 34; 37 T.L.R. 13.
[8] [1931] 1 Ch. 347.
[9] [1921] 1 Ch. 34; 37 T.L.R. 13.
[10] [1931] 1 Ch. 347.
[11] [1931] 2 Ch. 302.
[12] 4 App.Cas. 427.
[13] [1931] 2 Ch. 302.
[14] 2 Ex.D. 398, 412.

ROXBURGH J. This difficult case has been so ably argued that I feel able to deliver my judgment without postponement. By a resettlement, made on May 24, 1895, it was provided that certain hereditaments and premises should remain and be to such uses and on such trusts and in such manner generally as the said John Baron Churston, who was the grandfather of the present Lord Churston, and John Reginald Lopes Yarde-Buller, who was the father of the present Lord Churston, from time to time or at any time but during the life of Lady Churston, who was the grandmother of the present Lord Churston, with her consent in writing by deed or deeds revocable or irrevocable should jointly appoint; and there were other uses declared in default of appointment. By a deed dated March 22, 1898, those persons on whom that joint power of appointment had been bestowed, with the consent of Lady Churston, as provided by the resettlement of 1895, directed and appointed that the settled estates should be held to such uses on such trusts and in such manner generally as Lady Churston, that is the grandmother, the said John Baron Churston, that is the grandfather, and the said John Reginald Lopes Yarde-Buller, that is the father, should from time to time or at any time by deeds revocable or irrevocable jointly appoint; and uses were declared in default of appointment. The grandfather died on November 30, 1910, and thereupon the father became Lord Churston. By a deed dated August 16, 1923, and made between the grandmother and the father and certain other parties, the grandmother and the father in exercise, as the deed states, of the said power contained in the said deed dated March 22, 1898, made a joint appointment of the settled estates to certain uses.

The question is whether certain limitations affecting these settled estates infringe the rule against perpetuities. It is common ground that the answer to that question depends on whether or not appointments under the powers which I have read have to be read back into the original settlement for the purpose of applying the rule. So far counsel in their very helpful argument have agreed, and I therefore need not set out all the limitations or further discuss them. There are two further areas of agreement.

---

[15] [1931] 2 Ch. 302.

I mention them before I plunge into the not well lighted seas. First, it is common ground that if the powers of appointment are what are commonly known as special powers in which the field of dispositees is plainly limited, then the instrument exercising the power has to be read back into the instrument creating the power for the purpose of applying the rule. On the other side of the troubled area is the other area of common ground. If the power of appointment is a general power, in the ordinary acceptation of the term, under which A has the power to appoint the property to whomsoever he pleases, then the instrument exercising the power need not be read back into the original settlement for the purpose of applying the rule. But I have to deal with two powers which are not in the normal acceptation of the terms either special or general, and the question which I have to determine—and I must deal with each power separately, at any rate up to a certain point—is whether they more nearly approximate to normal special powers or to normal general powers. I think that if Bennett J. had not decided *In re Watts* [1] as he did, I should have felt bound to reserve my judgment.

It will be remembered that the two powers which I have read differ in this respect: the first is a joint power of appointment with the consent of a person who is not a donee of the power; the second, a joint power of appointment without any additional consent. In my judgment the first cannot possibly be distinguished from the power in *In re Watts*,[1] except in a manner detrimental to Mr. Milner Holland's case. The only difference is that in *In re Watts* [1] A had the power with the consent of B, whereas in the present case A and B have the power with the consent of C, which cannot make it better from Mr. Milner Holland's point of view.

Therefore, I consider that with regard to the first power the matter is actually covered by a decision binding on me. But Mr. Milner Holland has pressed me hard about Bennett J.'s decision in *In re Watts*,[1] and I think that I ought in deference to his argument to refer to it in my judgment. In *In re Watts* [1] the facts, as stated in the headnote, were these: "A marriage "settlement . . . contained a clause empowering the settlor (the "wife) at any time during the life of her mother by deed to revoke "(with the consent of her mother) the trusts declared by the "settlement, and to appoint and declare (with the consent of her

---

[1] [1931] 2 Ch. 302.

"mother) any new or other trusts powers and provisions concerning the premises to which such revocation should extend." Bennett J. held that that power was a special power. There certainly is a serious difficulty in accepting the whole of his reasoning. For some reason, which I have not appreciated, he thought it necessary to distinguish a decision of the Court of Appeal in *In re Dilke*,[2] and a decision of Maugham J. in *In re Phillips*.[3] First, I have been unable to discover why either of those cases solves the present problem; but if Bennett J. had to distinguish them I must confess that I cannot recognize the force of the grounds of distinction which he felt able to find. He said[4]: ". . . in interpreting the language used in the settlement "one must have regard to the fact that it is a settlement made "in consideration of marriage." I must admit that I cannot think why. I cannot think that for the purpose of applying the rule against perpetuities a power to appoint as A thinks fit with the consent of B can have a different effect according to whether it is in a marriage settlement or in any other settlement. Again, Bennett J. said[5]: "It is also material, in interpreting the "language used in the instrument, to have regard to the fact "that the power of revocation and new appointment is restricted "in point of time to the lifetime of Mary Abbott . . . ," that is, the mother. There again, with all respect, I cannot agree. That, of course, does show that the power is limited in duration; but a power to A to appoint to anybody he thinks fit during the life of B would be a general power of the common kind, though it could not be exercised after the death of B; by the terms of its creation it would thereupon cease to be a power at all. Likewise, a power to A to appoint to anybody he might think fit during a period of 21 years would appear to me to be a general power of the common kind, though obviously it could not be exercised after the expiration of the term of 21 years: and, likewise, certain cases on which Mr. Milner Holland relied seem to me to fall into this same group.

There was a power to appoint by will only. A power to appoint by will only is, of course, not a power to appoint at any time; that is quite clear. The power can be exercised, but the operation of the exercise of the power cannot take place until the death of the donee of the power; but on his death, if it is a power to appoint to anybody whom the donee thinks fit, it is a general power of the common kind. The limitation to "by will" is a limitation, not on the nature of the power, but on the point of time at which it can be exercised. I cannot, therefore, accept that distinction which Bennett J. drew. Then he said [6] that regard must also be had to the fact of "her consent in writing "being given both to the exercise of the power of revocation "and to the exercise of the power of new appointment." Again, I cannot appreciate the bearing of that. The two things are different things.

---

[2] [1921] 1 Ch. 34; 37 T.L.R. 13.

[3] [1931] 1 Ch. 347.

[4] [1931] 2 Ch. 302, 306.

[5] Ibid. 306.

I therefore cannot say that I can see any real ground of distinction on those facts between *In re Watts* [7] and *In re Dilke* [8] and *In re Phillips*,[9] neither of which, as far as I can make out, really throws any particular light on the present question. That, however, is not the whole of Bennett J.'s judgment. It is, I think, the part of his judgment which led Mr. Farrer astray in the learned note expressly attributed to him in Key & Elphinstone, 14th ed., vol. 2, at p. 1049. Mr. Farrer first of all says: "A power to two or more to appoint as they think fit is a general "power for the purpose of the rule." He cites no authority for that, and before the end of this judgment I shall be compelled to say that I cannot accept that undocumented dictum. Then he continues: "A power to X to appoint generally but with the "consent of Y, will be general or special for the purpose of the "perpetuity rule, according to whether on the true construction "Y has merely a bare veto on an appointment, or is under duty "to consider the beneficial interests which X proposes to appoint, "and the interests of those who take in default of appointment "(*In re Dilke* [10]; *In re Phillips* [11]); if he has such duty the power "is special: *In re Watts*." [12] That distinction, which no doubt is based upon the part of Bennett J.'s judgment to which I have already referred, is one that is, as far as I can see, without any authority to support it. Bennett J. continued [13]: "It seems to "me that it would not be right to hold that, upon the terms of the "powers contained in the marriage settlement which I have to "construe (the daughter) was in substance the owner of the "property, and consequently free to deal with it in any way she "pleased." That seems to me to be the fundamental basis of the decision of Bennett J., and that seems to me to be in accordance with authority. Therefore, far be it from me to suggest that that decision was wrong: but, right or wrong, I am bound by it.

---

[6] [1931] 2 Ch. 306.

[7] [1931] 2 Ch. 302.

[8] [1921] 1 Ch. 34.

[9] [1931] 1 Ch. 347.

[10] [1921] 1 Ch. 34.

[11] [1931] 1 Ch. 347.

[12] [1931] 2 Ch. 302.

[13] Ibid. 306.

Mr. Milner Holland, while arguing that the first power of appointment might escape the net of Bennett J.'s decision, really based his main submission on the proposition that at any rate it did not cover the second of the two powers; and as a matter of decision that is undoubtedly true. Therefore, I must try to spell out of the authorities, if I can, the true underlying principle of the distinction which is clearly recognized and admitted. In my judgment it is correctly stated by Bennett J. in the passage which I have read [14]: " . . . was in substance the owner of the property, " and consequently free to deal with it in any way she pleased." One must put in the words "in substance" or "practically," because even a person having a general power of appointment is not quite in the same position as an owner. True, he can give it to anybody he likes inter vivos. True, he can dispose of the property by will without referring to the power at all provided that he makes a residuary gift, but he may make a will which contains no residuary gift, or more probably, he may make no will at all, and in those circumstances the property will go as in default of appointment. So, as I have said, it is not absolutely true that even a person having a common general power of appointment is in quite the same position as an owner. Still, I think ~~that~~ the basis of the doctrine is that he is treated as though he were for all practical purposes the owner.

Ought that to be applied to a joint power of appointment or to a power of appointment to which the consent of somebody is required? It would be very strange if, while Bennett J.'s decision stood, a joint power of appointment was held to be equivalent for all practical purposes to ownership, because in each case consent of another person is required and I cannot see that it makes any difference whether the consent required is that of a person not a donee of the power or whether it is the consent of one of the donees of the power. A joint power of appointment is very much further away from ownership than is a general power of appointment vested in an individual. It is quite true that joint donees of a power of appointment may make the property their own, and, says Mr. Milner Holland, if that is so, why should it be necessary for them to go through the formal step of doing so? They certainly did not in this case; on the contrary, they purported to be exercising the power, not to be dealing with property which they had made their own. But, says Mr. Milner Holland, why should one draw a distinction?

---

[14] [1931] 2 Ch. 306.

Mr. Russell was right, I think, when he said that if they do make it their own, some very different consequences may ensue. I need not investigate the question of estate duty, but if there had been an antecedent agreement for valuable consideration it might operate to sever, and in bankruptcy there might be questions, and all sorts of different consequences might ensue. I am not going to consider the question whether in fact they do so: it is not necessary to do so in this case; but that might ensue. It is not a distinction without a difference.

I might, I think, have felt more difficulty about the case than I do but for what I think I ought to describe as dicta of great authority, one in the Court of Appeal and the other in the House of Lords, in *Attorney-General* v. *Charlton* [15] which in the House of Lords became *Charlton* v. *Attorney-General.*[16] Mr. Milner Holland rightly says that this is not a decision on the point which I have to decide. The court, however, did have to consider a problem not unlike that which I have to consider, though admittedly a different problem. In the headnote is the statement [17]: "S., tenant for life in possession, and W., his eldest son, tenant "in tail in remainder, of certain estates, by deed of the 22nd of "March, 1854, barred the entail, and settled the estates to such "uses as they should jointly appoint"; then, in default, on certain trusts to certain uses. It was held in the Court of Appeal [18] by three members of the court, one dissenting, that the successions—and this was a succession duty case—were derived from the donors of the power and not from the persons exercising the joint power of appointment. The question was whether that was going to be the right conclusion. Discussing that question, James L.J. said [19]: "A joint power of appointment is, in my "opinion, an entirely different thing in intention and practical "operation from a general and absolute power of appointment in "one individual. In the latter case it is really and practically "the equivalent of property—when exercised the property "becomes assets. In the other case it is what it purports to be— "a form of remoulding a settlement according to the exigencies of "the family." That is a dictum of quite general application.

Lord Selborne in the House of Lords in his speech said something which started by being restricted to taxation, but before its conclusion became of quite general application also. He said [20]: "If, however, the substance of the first branch of

---

[15] (1877) 2 Ex.D. 398.

[16] (1879) 4 App.Cas. 427.

[17] 2 Ex.D. 398.

[18] 2 Ex.D. 398.

[19] Ibid. 412.

[20] 4 App.Cas. 427, 446.

" the section is regarded "—that is the relevant section of the Succession Duty Act, 1853—" it certainly points to that kind of " absolute power which is practically equivalent to property "—the word " absolute " should be noted—" and which may reasonably be treated as property, for the purpose of taxation." So far it is obviously limited to taxation. Then he said: " That is " the case with a general power exercisable by a single person in " any way which he may think fit. But it is not the case when " a power cannot be exercised without the concurrence of two " minds; the one donee having, and the other not having, an " interest to be displaced by its exercise." Then comes something which I think is of general application: " Nothing could well be " conceived more unreasonable, in a practical point of view, than " to treat a joint power like that now in question, in a family " settlement, as equivalent in substance to joint property in the " two donees. . . ."

I take great comfort from those passages for two reasons. First, Mr. Milner Holland has pointed out, and Mr. Russell conceded, that if my decision is right, then there is in that well-honoured book of precedents by Davidson a precedent which infringes the rule against perpetuities. The precedent has disappeared sub silentio; it is not to be found in any modern book of precedents. On the other hand, no explanation of its disappearance has ever been offered. Even so, but for this passage I might have been loth to assume that in the course of time the precedent had been buried by conveyancers themselves; but the precedent in Davidson exactly fits that description given by Lord Selborne, and I have no doubt whatever that, having regard to what he said, if he had been asked to consider the relevant precedent in Davidson he would have said that it infringed the rule against perpetuities. Secondly, while this is not a decision on the question which I have to determine, it is a decision on what seems to me to be a very similar question. After all, what is the underlying broad principle of the rule against perpetuities? It is that property should not be tied up beyond a certain period of time. If the property ceases to be tied up, or, in other words, if it vests in a beneficial owner, then the mischief of the rule is avoided. Therefore, it seems to me only reasonable to suspect that the reason why a general power of appointment in the ordinary sense starts a new settlement, and has not got to be read back into the original settlement, is because the property is treated as vesting in the donee of the general power, though it is not quite strictly accurate to say that it does so; or, in other

1954

CHURSTON SETTLED ESTATES, *In re.*

Roxburgh J.

words, that the test really is: is there somebody who for all practical purposes can be treated as the owner? Then if that is the test, the next question is: can a joint donee of a power be for all practical purposes treated as an owner? It seems to me that both James L.J. and Lord Selborne repudiated that conception; and in those circumstances I certainly would not be prepared to differ from Bennett J.'s decision, or to try to draw some distinction between the case which he decided and the case of a joint power of appointment. They are different, but in my judgment no distinction should be drawn between them.

There will be a declaration that the settled estates are now held on trust for Lord Churston for a beneficial and indefeasible estate in fee simple in possession.

Declaration accordingly.

Solicitors for all parties: *Ellis, Peirs & Co.*

K. R. A. H.

In re WRIGHT. BLIZARD *v.* LOCKHART.

[1943 W. No. 581.]

1954
Feb. 18, 19.

Roxburgh J.

C. A.

1954
Mar. 25;
Apr. 13.

Denning and Romer L.JJ.

Estoppel—Per rem judicatam—Order for inquiry—No final determination of rights—Principle of res judicata by implication not applicable.

Charity—Practicability—Bequest—Intervening tenancy for life—Date for determining practicability of bequest.

The trustees of the will of a testatrix, who died in 1933, held her residuary estate, subject to a prior life interest, which had determined in 1942, upon trust to found and maintain a convalescent home.

An order was made in January, 1948, on an application by originating summons to determine the validity of the charitable bequest, directing an inquiry (inter alia) as to the practicability of that bequest "now or . . . at any future time"; and it was further ordered that the rest of the summons should stand over. In July, 1952, the master made his certificate stating that it was not then possible to carry into execution the trusts.

In 1953 the summons was amended to ask, alternatively, whether a general charitable intention was shown, and the court was also asked to determine whether the practicability of the charitable trust was to be estimated at the date of the death of the testatrix or at the date of the death of the tenant for life. The question arose whether, as a result of the order of 1948, that matter was res judicata:—

Held, by the Court of Appeal, that the order of 1948 directing the inquiry was only intended to be an approach towards the final answer to the question raised by the summons and was not intended to be a final answer in itself, and that the principle of res judicata by implication had no application.

In re Koenigsberg [1949] Ch. 348; [1949] 1 All E.R. 804 considered.

Held, also, that once money was effectually dedicated to charity, whether in pursuance of a general or a particular charitable intent, the testator's next-of-kin or residuary legatees were for ever excluded and no question of subsequent lapse or of anything analogous to lapse between the date of the testator's death and the time when the money became available for actual application for the testator's purpose could affect the matter—there was no distinction between a gift for a particular charitable purpose on the one hand and a gift to an individual or to an existing and specified charity on the other hand; and that, accordingly, the date for ascertaining the practicability of the charitable trust was the date of the death of the testatrix.

Principle laid down in *In re Slevin* [1891] 2 Ch. 236; 7 T.L.R. 394 applied.

In re Moon's Will Trusts, 64 T.L.R. 123; [1948] 1 All E.R. 300; [1948] W.N. 55 approved.

Decision of Roxburgh J. affirmed.

ORIGINATING SUMMONS.

By her will dated December 2, 1932, Alice Marion Wright directed her trustees to stand possessed of the residuary trust fund (subject in the events which happened to a prior life interest) upon trust therewith "to found and maintain a convalescent "home to be called 'The Alice Marion Wright Convalescent "'Home' (hereinafter referred to as 'the Home') for the purposes and in manner following viz. (a) The Home shall be used "only as a place in which impecunious gentlewomen who are "recovering from illness shall be permitted to stay free of expense "to them during convalescence in order to recuperate their "health. (b) My trustees shall with the sanction of the High "Court or a judge thereof or of the Charity Commissioners under "section 8 of the Mortmain and Charitable Uses Act, 1891, either "retain any suitable dwelling-house including a convenient garden "and appurtenances thereto belonging to me at my death which "may be regarded as a suitable site for the Home or may purchase "such a dwelling-house garden and appurtenances or may take "a lease (whether long or short) for such period as my trustees "deem proper or a tenancy from year to year of such dwelling-"house garden and appurtenances. (c) Such dwelling-house "garden and appurtenances to be situate in England but may be "in whatever place my trustees in the exercise of their discretion "(with or without expert advice) consider under the circum-"stances is convenient and proper for the purposes of the Home. "(d) My trustees may from time to time expend such money "out of capital as may be required for adapting the property so "retained or purchased or leased or tenanted for its suitable use as "the Home and for furnishing and equipping the same property "for such use and for keeping the same and the replenishing "thereof in good and sufficient repair for such use. (e) My "trustees shall pay out of the income all rent rates taxes heating "lighting fuel food replenishments in the garden all salaries "and wages doctors' bills chemists' bills and all other ordinary "working and running expenses in connexion with the Home. "(f) Proper accounts shall be kept audited at least once in every "year. (g) The only essential condition for the admission of "an inmate shall be that she is a poor gentlewoman recovering "from illness—such inmate shall be admitted strictly in order "of application. No inmate shall be kept for longer than six "months or shall be given any preference or be refused on any "ground of her religion or want of it or be compelled to attend "any religious service. Any inmate who can afford to make any "payment towards the cost of her food while staying in the Home "shall be allowed to do so if she expresses a wish to that effect. "(h) Subject to the preceding seven clauses my trustees shall "have the care and management of the Home and may from "time to time make add to and alter such rules and regulations "(or revoke the same and make new ones) as they deem proper "and convenient for giving effect to the purposes hereinbefore "laid down. (i) My trustees may solicit and accept donations to "capital and subscriptions to income. Surplus income at the "end of each year shall be invested but with power for my "trustees to resort thereto and use such investments as income "if they find it necessary to do so."

The testatrix died on March 15, 1933, and the tenant for life died on February 15, 1942. A summons was taken out in 1943 by the trustees of the will to determine: "(1) Whether "on the true construction of the said will and in the events "which have happened the gift therein contained of the pro-"ceeds of sale of the testatrix's residuary real and personal "estate upon trust thereout to found and maintain a convalescent "home to be called 'The Alice Marion Wright Convalescent "'Home' for the purposes and in manner therein particularly "mentioned constitutes a good and effective charitable gift. "(2) If the answer to question (1) shall be in the affirmative, "that a scheme may be directed for the purpose of carrying "the said trust into effect or that otherwise directions may be "given as to how the plaintiffs, as the present trustees of the "said will, ought to apply or deal with the subject-matter of "the said gift. (3) If the answer to question (1) shall be in the "negative, whether on the true construction of the said will and "in the events which have happened the testatrix has died "intestate in respect of the subject-matter of the said gift." They also sought: "(4) If necessary, an inquiry whether it is "now or will at any future time be possible to carry into "execution the trusts declared by the said will for the establishment in the manner thereby directed of a convalescent home "to be called 'The Alice Marion Wright Convalescent Home.' "(5) If necessary, an inquiry as to next-of-kin. (6) A representation order. (7) If necessary, administration of the "testatrix's estate, and (8) costs.

On February 2, 1944, Vaisey J., on this summons, ordered that it should stand over until February 3, 1947, and that the plaintiffs should thereupon restore the application to the list for hearing, with liberty to the parties to apply to restore the application to the list for hearing in the meantime if they should be so advised.

On January 27, 1948, Wynn-Parry J. ordered that the following inquiries be made, that is to say: "(1) an inquiry "whether it is now or will at any future time be possible to "carry into execution the trusts declared by the will of the "above-mentioned testatrix Alice Marion Wright for the establishment in the manner thereby directed of a convalescent home "to be called 'The Alice Marion Wright Convalescent Home'"; and, secondly, an inquiry as to next-of-kin; and directed that "the rest of the said originating summons is to stand over."

The master made a certificate which was filed on July 4, 1952, in answer to that inquiry, and his answer was: "It is not "now possible to carry into execution the trusts. From the "evidence adduced I am unable to certify whether it will at any "future time be possible to carry into execution the said trusts "and the question is left for the consideration of the court." A reasonable interval having been allowed to elapse after that certificate was obtained, an application was made on September 4, 1953, for leave to amend the summons, and leave was granted. The summons was amended to ask: "Alternatively, whether "on the true construction of the said will the testatrix has "shown therein a general charitable intention and the subject-"matter of the said gift ought to be applied cy-près."

The questions to be determined were (1) whether the matter was res judicata as a result of the order of Wynn-Parry J.: and (2) whether the practicability of the charitable trust was to be estimated at the date of the death of the testatrix on March 15, 1933, or at the date of the death of the tenant for life on February 15, 1942.

Hubert Rose for the plaintiffs.

G. B. H. Dillon for beneficiaries under the will of the testatrix. The result of the order of Wynn-Parry J. is that the matter has become res judicata. The answer to the inquiry being that the master found that the carrying out of the trust was impracticable, the matter ends there. [Reference was made to *In re Koenigsberg.*[1]]

Denys Buckley for the Attorney-General. In directing an inquiry the court is not deciding anything. The directing of an inquiry is really the same thing as standing the summons over for the filing of further evidence. [He referred to Spencer Bower on Res Judicata, pp. 17, 18.] Here nothing has been determined. There is no question of law or fact to be decided. It is impossible to have res judicata without a question of law or fact. An order directing an inquiry can never amount to a decision. That which Wynn-Parry J. decided in 1948 does not conclude the matter at all.

G. B. H. Dillon replied.

ROXBURGH J. This summons raises a difficult question relating to the law of res judicata by implication. The question is whether or not this case falls within the judgment which the Court of Appeal gave in reversing my last decision on this subject. [His Lordship stated the facts as above set out and continued:]

Mr. Buckley, on behalf of the Attorney-General, is anxious to argue, if he is allowed to do so, that the material date on which to determine the practicability of the charitable trust is the date of the death of the testatrix, and the question which I have to determine today is whether he is to be allowed to argue that point.

It is said, and said quite truly, that the inquiry must have been directed on the footing that the material date was not the date of the death of the testatrix. No court would ever have directed that inquiry without further argument, if anybody had suggested that the date of the death of the testatrix was the material date. I should be inclined to go further and say that no court would ever at that stage have directed an inquiry as to next-of-kin without further argument. If anybody had suggested that the trust was impracticable, then the next question would be whether the fund ought to be applied cy-près. I agree that that is perhaps not so obvious an inference as the first inference, but none the less I feel that it is one which should be drawn. Therefore, I think that it might well be that, if I decided this point against the Attorney-General, I might also be compelled to decide that he could not argue the question of cy-près. I have referred to that question, not because it is directly relevant, but because it is always important when advancing down a comparatively new path to see whether there is any place where one can safely stop.

---

[1] [1949] Ch. 348.

The principles of law applicable are stated so concisely in *In re Koenigsberg*[1] that I need only read about ten lines. The facts of that case were different from these, though many features were common to both. In the course of his judgment, which was the first judgment, Somervell L.J. said[2]: "If "the order as made by the court necessarily involves a finding "(whether there was argument or not) on the point which is later "sought to be litigated, the cases lay down that that point "cannot be raised." Later (and this is very much in point) Somervell L.J. said[2]: "I agree that the word 'traversable'" —he was citing from *Hoystead* v. *Commissioner of Taxation*,[3] I think—"contemplates pleadings rather than an originating "summons. But when a trustee or anyone takes out an "originating summons, he can make quite clear to those whom "he has to bring before the court what point or points he wants "decided, and it is for the defendants to raise and take points "and file evidence which deals with the points which in the "originating summons are put before the court for decision."

I think that the present case is extraordinarily near the line. At first I was quite certain that Mr. Dillon was right. Obviously, counsel for the Attorney-General could have submitted to the court that that was not the really relevant question, and I am equally certain that if he had done so the judge would never have directed that inquiry without further argument. I do not think

---

[1] [1949] Ch. 348.

[2] Ibid. 362.

[3] [1926] A.C. 155; 42 T.L.R. 207.

1954

WRIGHT, *In re.* BLIZARD *v.* LOCKHART.

that that can be gainsaid. At first that would seem to me to bring the case directly within *In re Koenigsberg*,[4] but Mr. Buckley has convinced me, though by a very narrow margin, that an order for an inquiry ought not to be regarded as a decision in a case where the very question to which the inquiry relates is, by the very order directing the inquiry, directed to stand over. It is not merely that an order for an inquiry is somewhat different from other kinds of orders, nor it is merely that there is a direction that the question is to stand over. It is, in my judgment, the combination of both. Undoubtedly, there are cases in which there may be res judicata by implication, though the litigation from which the res judicata springs is still in process of further litigation. But it seems to me that when, as here, the question whether, on the true construction of the will, the gift is a good and effective charitable gift is expressly directed by the order to stand over, and an inquiry is directed as to facts which are thought to be relevant to the answer to the question, it is carrying this doctrine unwarrantably far to hold that, because a certain hypothesis of law certainly did underlie the direction for an inquiry, the acceptance of that hypothesis for that purpose can be used as a conclusive argument against the further investigation of the question of law which is by the order expressly reserved. It is clear that this doctrine of res judicata by implication has never yet been extended to a case like the present. The differences between this case and *In re Koenigsberg* [4] are manifest, and if the doctrine were to be so extended I think that it might lead to a considerable increase in the costs of litigation; but, on the whole, I think that the doctrine is not to be extended to such cases.

The question as to the date at which the practicability of the charitable trust was to be estimated was then argued.

G. B. H. Dillon. There is no authority in which the question of date has been argued with regard to a case such as this. The material date is the date of the death of the tenant for life. [*In re Wilson* [1] and *In re Moon* [2] were referred to.] The present case is not covered by *In re Moon*.[2] In that case the trustees were merely directed to pay over certain moneys to other trustees. Here the trustees are directed to found and maintain a home at a future date. The court would only allow a charitable intention

---

[4] [1949] Ch. 348.

[1] [1913] 1 Ch. 314.

[2] (1948) 64 T.L.R. 123; [1948] 1 All E.R. 300; [1948] W.N. 55.

1954

WRIGHT, *In re.* BLIZARD *v.* LOCKHART.

to be carried out at the date when it was ordered to be carried out. [Reference was made to *In re Slevin.*[3]]

Denys Buckley. *In re Moon*[4] turned on the vesting of the gift in charity. In the case of residuary legatees the court must determine the question at the date when the legacy would take effect, if at all.

ROXBURGH J. In this case the testatrix died on March 15, 1933, and purported to create a charitable trust to take effect on the death of a life tenant who died on February 15, 1942. The question which I have to determine now is whether the practicability of the purported charitable trust is to be ascertained at the date of the death of the testatrix, or at the date of the death of the tenant for life.

The year 1942 was in the middle of the second great war; and already the value of money had begun to change, though it had not then reached what I hope are the extremities of its change. Therefore, the point is of considerable importance. In *In re Moon*[1] I decided that, although there was an intervening life interest, the date to determine that question was the date of the death of the testator. Counsel who argued that case, and they included counsel for the Attorney-General, put before me certain cases, and it was, I think, agreed on all sides that none of them really covered the point. I reached a conclusion which is to be found in the report of that case. Whether I was right or wrong is not a question which I am called on to resolve. Mr. Dillon valiantly set out to convince me, if he could, that my decision was wrong, and he did it by quite a legitimate method of approach, namely, that there were cases to which I had not been referred in *In re Moon*,[1] and that, if I had been referred to them, I should have been satisfied that it was not open to me to decide *In re Moon*[1] as I did. Now I agree that, if he had established that proposition, I should not have followed my own decision, but, though he argued the matter with great skill, he has wholly failed to establish it. He first of all started with *In re Wilson.*[2] As to that case, for one thing there was no lis on this point at all, and for another thing, it was a case of a contingent reversionary bequest.

Then he valiantly pursued his theme to Scotland and cited

---

[3] [1891] 2 Ch. 236.

[4] 64 T.L.R. 123.

[1] (1948) 64 T.L.R. 123; [1948] 1 All E.R. 300; [1948] W.N. 55.

[2] [1913] 1 Ch. 314.

Hay's Judicial Factor v. *Hay's Trustees*,[3] which was decided in the House of Lords. But there again, it is quite plain that there was no lis about this matter. I need only read the form of the proceedings which gave birth to that case. Somebody submitted to the Court of Session the following question: whether, in view of the impossibility of giving effect to the bequest, the said bequest failed. There the condition precedent on which everybody proceeded to the court was that the trust was impracticable. Therefore, it could not be a decision on the question how one sets out to determine whether a trust is impracticable. Then again, there is another case where certainly there is to be found some comfort for Mr. Dillon; but in that case the charitable gift was contingent. There were powers to resort to capital in aid of a life interest and, most important of all, plainly there was no lis. All counsel proceeded in their arguments on the footing that the trust was impracticable.

Then Mr. Dillon sought to distinguish *In re Moon*.[4] His ground of distinction was this: that in *In re Moon*[4] the direction to the trustees of the will was to transfer the property on the death of the life tenant to charitable trustees. In the present case, the direction is that the will trustees themselves should on the death of the life tenant carry out the charitable trust. I may be wrong altogether in *In re Moon*,[4] but I would far rather be held to be wrong than start a series of hair-splitting distinctions which will merely confuse and confound the legal profession. It appears to me that that distinction cannot possibly be decisive. Therefore I refuse to draw it. In my judgment this case is covered by *In re Moon*,[4] and the only place in which to get a different decision is in the Court of Appeal. Therefore, the date is the date of the death of the testatrix.

I will therefore declare that the Attorney-General is not estopped by the doctrine of res judicata by implication from contending that the proper date at which to ascertain the practicability of the charitable trust in suit is the date of the death of the testatrix, and I will further declare that that is the proper date.

Declaration accordingly.

J. L. D.

The next-of-kin appealed.

G. B. H. Dillon for the next-of-kin of the testatrix. First, it is submitted that the date for determining whether it is practicable to carry the charitable intention of the testatrix into effect is res judicata by implication. The order of January 27, 1948, directing an inquiry whether it was then practicable to carry into execution the trusts declared by the will, must have been made on the footing that the material date was the death of the tenant for life. The court chose to approach question 1 of the summons by stages. An order made in regard to one stage, concludes that stage. Question 1 of the summons was stood over until all the other questions were decided. The orders of Vaisey and Wynn-Parry JJ. with the master's answer to the inquiry concludes the matter. All that remains to be considered is the effect of the master's finding. The decision in *In re Koenigsberg* [1] covers this case.

---

[3] 1952 S.C.(H.L.) 29.

[4] 64 T.L.R. 123.

Secondly, it is submitted that the correct date on any footing for determining the practicability of giving effect to the wishes of the testatrix is the date of the death of the tenant for life. The principle applied in *In re Moon's Will Trusts* [2] and in *In re Slevin* [3] does not apply here; the gift in those cases was to an existing institution. There is a distinction between a gift to a person and a gift for a purpose. The latter gift is only valid if the purpose is practicable. Where there is a particular charitable intent, practicability must be considered when the time comes to carry out the particular intention. The logical time to test the question whether it is possible to found this convalescent home is when it is to be founded. This gift is conditional on it being practicable when it falls to be carried into effect. This is a case of lapse: *In re Wilson.*[4] Any gift for a particular charitable purpose is from its nature conditional on its being able to take effect. [Reference was made to *In re James.*[5]]

Denys Buckley, for the Attorney-General, was asked to confine his argument to the second contention of the next-of-kin. The position is the same in the case of any charitable gift, whether immediate or future. The cesser of the charity or the supervening impossibility of it taking effect will not defeat the gift, unless, on its true construction, it is contingent on it being practicable to carry it out in some particular way. Unless the gift is contingent, it is right to look at the circumstances at the death of the testator. Rights between a charity as legatee and next-of-kin or residue must be ascertained as at the death, unless the gift is contingent.

---

[1] [1949] Ch. 348; [1949] 1 All E.R. 804.

[2] 64 T.L.R. 123; [1948] 1 All E.R. 300; [1948] W.N. 55.

[3] [1891] 2 Ch. 236; 7 T.L.R. 394.

[4] [1913] 1 Ch. 314.

[5] [1932] 2 Ch. 25; 48 T.L.R. 250.

It has been contended that every gift for a particular charitable purpose is conditional. There are no authorities which support that view. The legatees under a charitable trust become entitled at the testator's death to deal with their legacy, unless the testator has made it subject to some contingency. The same rules govern property given to a charity, as property given to individuals. The observations of Lord Selborne L.C. in *Chamberlayne* v. *Brockett* [6] and the decisions in *In re Soley* [7] and *In re Geikie*,[8] together with the decision in *In re Slevin*,[9] support the correctness of the reasoning in *In re Moon's Will Trusts.*[10] It is not right to say that, where money is given for a particular purpose, the gift is contingent on the purpose being practicable when the money is payable. The onus is on the person asserting impracticability. With regard to the decision in *In re James*,[11] that was a case of an immediate gift and there was no suggestion of any change of circumstances between the date of the death of the testator and the date of the inquiry.

Hubert Rose for the plaintiffs.

Cur. adv. vult.

April 13. The following judgment was read.

ROMER L.J., after stating the facts, continued: The summons, as amended, came on for further hearing before Roxburgh J., and he made the order of February 19, 1954, from which this appeal has been brought. Mr. Buckley, who appeared on behalf of the Attorney-General, sought to argue before the judge that the relevant date for inquiring whether the testatrix's charitable intentions were capable of being carried into effect was not the date of the order made by Wynn-Parry J., or at any time thereafter, but was the date upon which the testatrix died. Mr. Dillon, for the next-of-kin, submitted that, having regard to the previous orders and proceedings, it was not now open to the Attorney-General so to contend; he argued that the Attorney-General was estopped by res judicata by implication from raising this point.

Roxburgh J., with some hesitation, decided in favour of the Attorney-General upon this question. He said that the principles of law applicable had been concisely stated in *In re Koenigsberg*,[1]

---

[6] (1872) L.R. 8 Ch. 206, 210.
[7] (1900) 17 T.L.R. 118.
[8] (1911) 27 T.L.R. 484.
[9] [1891] 2 Ch. 236.
[10] 64 T.L.R. 123.
[11] [1932] 2 Ch. 25.
[1] [1949] Ch. 348; [1949] 1 All E.R. 804.

C. A.
1954

WRIGHT, *In re.* BLIZARD *v.* LOCKHART.

Romer L.J.

and cited the following passages from the judgment of Somervell L.J. in that case [2]: " If the order as made by the court necessarily " involves a finding (whether there was argument or not) on the " point which is later sought to be litigated, the cases lay down " that that point cannot be raised. . . . I agree that the word " ' traversable ' " (the word used by Lord Shaw in delivering the judgment of the Privy Council in *Hoystead* v. *Commissioner of Taxation* [3]) " contemplates pleadings rather than an originating " summons. But when a trustee or anyone takes out an originating summons, he can make quite clear to those whom he has " to bring before the court what point or points he wants decided " and it is for the defendants to raise and take points and file " evidence which deals with the points which in the originating " summons are put before the court for decision." Roxburgh J. then expressed his views upon the point as follows [4]: " Mr. " Buckley has convinced me, though by a very narrow margin, " that an order for an inquiry ought not to be regarded as a " decision in a case where the very question to which the inquiry " relates is, by the very order directing the inquiry, directed to " stand over. It is not merely that an order for an inquiry is " somewhat different from other kinds of orders, nor is it merely " that there is a direction that the question is to stand over. It " is, in my judgment, the combination of both. Undoubtedly, " there are cases in which there may be res judicata by implication, though the litigation from which the res judicata springs " is still in process of further litigation. But it seems to me that " when, as here, the question whether, on the true construction " of the will, the gift is a good and effective charitable gift is " expressly directed by the order to stand over, and an inquiry " is directed as to facts which are thought to be relevant to the " answer to the question, it is carrying this doctrine unwarrantably " far to hold that, because a certain hypothesis of law certainly " did underlie the direction for an inquiry, the acceptance of that " hypothesis for that purpose can be used as a conclusive argument against the further investigation of the question of law " which is by the order expressly reserved. It is quite clear that " this doctrine of res judicata by implication has never yet been " extended to a case like the present. The differences between " this case and *In re Koenigsberg* [5] are manifest, and if the " doctrine were to be so extended, I think that it might lead to " a considerable increase in the costs of litigation; but, on the

---

[2] [1949] Ch. 348, 362.

[3] [1926] A.C. 155; 42 T.L.R. 207.

[4] Ante, 353.

[5] [1949] Ch. 348.

"whole, I think that the doctrine is not to be extended to such "cases."

I have quoted this language of the judge in full, because it appears to me, if I may respectfully say so, to state the answer to Mr. Dillon's contention in the clearest possible way. It is true that counsel for the Attorney-General could, if he had wished to do so, have objected to the form of inquiry which was ordered by Wynn-Parry J., on the ground that it was not directed to the relevant question and that the inquiry should have been directed to the question whether it was possible, at the time of the testatrix's death, to establish the convalescent home. I cannot, however, appreciate why his omission to do so, or the fact that the inquiry which Wynn-Parry J. directed was taken, can operate now as an estoppel in the manner suggested. The inquiry was in fact a preliminary step on the road to answering question (1) of the originating summons and that question itself was directed to stand over with a view to being disposed of at a later date. If the inquiry had been answered affirmatively, it would probably follow that an affirmative answer would, at a later stage, also be given to question 1 of the summons. It does not further follow, however, that a negative or uncertain certificate on the inquiry would involve, of necessity, a negative answer to question (1); for, as I have already indicated, the order directing the inquiry was only intended to be an approach towards the final answer to the question and not to be a final answer in itself.

I am accordingly of the opinion that the principle of res judicata by implication has no application to the present case and that the appeal on this point fails. I would add that the law on the subject, so far as applicable, sufficiently appears from the judgment of Somervell L.J. in *In re Koenigsberg*,[5] and no authority of additional value was cited to us in argument.

The next question to be considered, accordingly, is whether the judge was right in holding that the proper date for ascertaining whether the establishment of the convalescent home was practicable was the date of the testatrix's death.

Mr. Dillon's argument, on behalf of the testatrix's next-of-kin, was to the effect that the gift in the will was for a special charitable purpose: namely, for the establishment and maintenance of the convalescent home which the testatrix had in mind and which she described with such particularity; and that the gift was dependent and conditional upon it being practicable to carry the

---

[5] [1949] Ch. 348.

C. A.

1954

WRIGHT, *In re.* BLIZARD *v.* LOCKHART.

Romer L.J.

purpose, as so described, into effect when the death of the life tenant, Mrs. Webb, made the fund available for the home. It is not so much a question of lapse, he said, as a condition of practicability being attached to the gift, so that if the condition could not be satisfied the bequest would fail. Mr. Buckley, on the other hand, contended that no such condition or contingency as suggested attached to the bequest. He argued that in the case of any charitable gift by will, whether immediate or future, no question of impracticability supervening after the testator's death is of any materiality, provided that the object or purpose to which the gift is to be applied is practicable when the testator died. That is the time, he argued, when the rights of the parties, charity on the one hand and the next-of-kin or other persons taking in default on the other, are to be ascertained and they are to be ascertained at that time once and for all.

In the present case Roxburgh J. followed, on the point now under consideration, his earlier decision in *In re Moon.*[6] In that case a testator directed that after the death of his wife his trustees should pay a legacy of "£3,000 to the Trustees of the "Gloucester Street Wesleyan Methodist Church at Devonport on "trust to invest the same in some Government security and to "apply the income thereof to mission work in the district served "by the said Gloucester Street Wesleyan Methodist Church "including particularly John Street and Moon Street." When the testator's widow died, it had become impracticable to carry out the mission work which the testator envisaged. Roxburgh J. held that the gift was charitable and held further that, although the legacy was a future legacy, the question whether or not the charitable purpose lapsed for impracticability had to be ascertained at the moment when the charity trustees became absolutely entitled to the legacy, that was, at the moment of the testator's death and not at the moment when it became payable. The judge was guided to this conclusion by the reasoning of the judgment of this court in *In re Slevin,*[7] which was delivered by Kay L.J. The testator in that case bequeathed, amongst other "charitable legacies," a legacy to an orphanage which was in existence at the time of the testator's death but which was discontinued before his assets had been administered and therefore before the legacy was or properly could be paid. The question was whether, in those circumstances, the legacy failed and fell into residue. In the course of the argument Kay L.J. rhetorically asked[8]: ". . . where the charity, the legatee, is in existence at "the death of the testator, and has received, or might have "received the legacy, does not the legacy by that very fact "become impressed with charity which the residuary legatee "cannot get rid of?" The judgment of the court gave an affirmative answer to that question. The following passages from that judgment were relevant to *In re Moon*[9] and are, I think, equally relevant to the present case.[10] "Properly speak-"ing, a lapse can only occur by failure of the object in the life-"time of the testator; but it is possible that a will might be so "framed as that a subsequent failure of the object of the charit-"able gift might occasion a resulting trust for the benefit of the "testator's estate. We have not been referred to any such case, "nor have we found any. . . . If it [the legacy] had been "received, the whole might have been expended at once; and, "even if not received, the amount might have been anticipated "by borrowing from a banker, or otherwise, and charging this "legacy with the amount so borrowed. . . . The orphanage did "come to an end before the legacy was paid over. In the case "of a legacy to an individual, if he survived the testator it could "not be argued that the legacy would fall into the residue. "Even if the legatee died intestate and without next of kin, still "the money was his, and the residuary legatee would have no "right whatever against the Crown. So, if the legatee were "a corporation which was dissolved after the testator's death, "the residuary legatee would have no claim. Obviously it "can make no difference that the legatee ceased to exist "immediately after the death of the testator. The same law "must be applicable whether it was a day, or month, or year, "or, as might well happen, ten years after; the legacy not having "been paid either from delay occasioned by the administration of "the estate or owing to part of the estate not having been got in. "The legacy became the property of the legatee upon the death "of the testator, though he might not, for some reason, obtain "the receipt of it till long after. When once it became the "absolute property of the legatee, that is equivalent to saying "that it must be provided for; and the residue is only what "remains after making such provision. It does not for all pur-"poses cease to be part of the testator's estate until the "executors admit assets and appropriate and pay it over; but "that is merely for their convenience and that of the estate.

---

[6] 64 T.L.R. 123; [1948] 1 All E.R. 300; [1948] W.N. 55.

[7] [1891] 2 Ch. 236; 7 T.L.R. 394.

---

[8] [1891] 2 Ch. 237.

[9] 64 T.L.R. 123.

[10] [1891] 2 Ch. 236, 239.

C. A.
1954

WRIGHT,
In re.
BLIZARD
v.
LOCKHART.

Romer L.J.

"The rights as between the particular legatee and the residue are "fixed at the testator's death."

Now, as Mr. Buckley pointed out, if the argument of the next-of-kin on the present appeal be right, the decision in *In re Slevin* [10] would have been that the gift had failed by reason of the fact that, by the time the executors were administratively able to pay the legacy, the orphanage to whom the testator had given it had been discontinued and therefore the purpose of the gift had become impracticable. The court did not, however, take that view, but held that, as the orphanage existed and was capable of taking when the testator died, the gift took effect just as it would have done if the legatee had been an individual who survived the testator but died before payment. The reasoning in *In re Slevin* [10] appears to me to have been almost conclusive of the question in *In re Moon*,[11] and in my opinion the decision of Roxburgh J. in that case was perfectly right. It accordingly follows that, unless there is any distinction in principle between *In re Moon* [11] and the present case, the appeal must necessarily fail. Mr. Dillon contended that a future gift, as here, to a particular charitable purpose is in a different position from a gift to a particular charitable institution; and that, although a condition of survival, as it were, may not attach to the latter, it does attach to the former. Mr. Buckley, on the other hand, said that a particular charitable purpose is, in effect, an entity just as charity generally is regarded as being; and that it could only be defeated by the next-of-kin in the present case if they could sufficiently show (and the onus would lie upon them) that the purpose which the testatrix had in mind was doomed to inevitable failure from the moment when the testatrix died; and that they could not have discharged this onus, for the life tenant under the compromise might have died at any time and, in particular, might have died while the purpose which the testatrix desired to achieve was still capable of fulfilment.

In my opinion the distinction which Mr. Dillon sought to draw between a particular charitable purpose on the one hand and an individual or an existing and specified charity on the other hand is not a sound distinction. Once money is effectually dedicated to charity, whether in pursuance of a general or a particular charitable intent, the testator's next-of-kin or residuary legatees are for ever excluded and no question of subsequent lapse, or of anything analogous to lapse, between the date of the testator's death and the time when the money becomes available for actual application to the testator's purpose can affect the matter so far as they are concerned. This conclusion necessarily follows, I think, upon the reasoning in *In re Slevin.*[12] In *In re Soley*[13] a testator bequeathed money on trust to pay the income thereof to a person for life and, after his death, the fund was given to the Drapers' Company to be applied by them for the benefit of their school at Tottenham, either by founding a scholarship or scholarships for the encouragement of the scholars in various branches of learning or in such other manner as the Masters, Wardens and Court of Assistance in their absolute discretion should think most suited to promote the interests of the college. The gift, accordingly, was for the promotion of a particular charitable purpose. After the testator's death, but during the lifetime of the tenant for life, the college ceased to exist. Byrne J., following *In re Slevin,*[14] held that there had been no lapse of the bequest and directed that it should be applied for charitable purposes cy-près. A similar decision was that of Neville J. in *In re Geikie,*[15] and indeed the decision of Roxburgh J. in *In re Moon*[16] itself proceeded on the same footing. It is true that in all these cases the funds which were in question were to be paid over to other persons or bodies to be applied by them to the designated charitable purposes, whereas, in the present case, it is the trustees themselves who were so to apply the residuary trust fund, but in my opinion no difference of principle arises from this; the testatrix's trustees hold the fund impressed with a charitable trust, just as did the third parties in the other cases to whom the gifts were directed to be paid. I am accordingly of opinion that no legitimate distinction exists, either on principle or on authority, between the present case and *In re Moon*[16] and that the judge's decision upon this question was right and should be affirmed.

---

[10] [1891] 2 Ch. 236, 239.

[11] 64 T.L.R. 123.

I would only add that, although the question before us is not one of construction, nevertheless a contrary conclusion in the present case would in fact quite clearly defeat the intention of the testatrix. The life interest in residue, which deferred for years the fulfilment of the testatrix's wishes as expressed in her will, arose from the settlement of the probate proceedings and not from any bounty of the testatrix herself. She wanted the charity to be founded immediately upon her death and, but for the change in her testamentary dispositions effected by the compromise, her next-of-kin could have had no possible claim to the fund. It is, therefore, without reluctance that I have reached the conclusion that the appeal should be dismissed.

---

[12] [1891] 2 Ch. 236.

[13] (1900) 17 T.L.R. 118.

[14] [1891] 2 Ch. 236.

[15] (1911) 27 T.L.R. 484.

[16] 64 T.L.R. 123.

DENNING L.J. I agree. The result, therefore, is that the appeal will be dismissed.

Appeal dismissed.

Solicitors: *Beale & Co.; Frank Taylor Nightingale & Baker; Treasury Solicitor.*

B. A. B.

1954
Feb. 3, 4, 5, 8, 9.
Upjohn J.

IVEAGH *v.* INLAND REVENUE COMMISSIONERS.

[1953 I. 7382.]

Revenue—Estate duty—Surrender of life interest—Personalty—Investments subsequently made—"Property" deemed to pass on death—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 22 (1) (*f*)—*Finance Act,* 1940 (3 *&* 4 *Geo.* 6, *c.* 29), *s.* 43.

Conflict of Laws—Settlement—Proper law—Executed in England—Parties domiciled in Ireland—English solicitors—Same system of law in both countries—No express power to invest in land in Ireland. Trust and Trustee. Trust fund—Conception as continuing entity—"Property taken."

Section 43 of the Finance Act, 1940, provides: "Where an "interest limited to cease on a death has been disposed of . . . by "surrender . . . (*a*) if apart from the disposition . . . the property "in which the interest subsisted would have passed on the death "under section 1 of the Finance Act, 1894, that property shall be "deemed by virtue of this section to be included as to the whole "thereof in the property passing on the death;"

Section 22 (1) (*f*) of the Finance Act, 1894, defines "property" to include "real property and personal property and the proceeds "of sale thereof respectively and any money or investment for the "time being representing the proceeds of sale:"

By a voluntary settlement dated July 1, 1907, when the territory of the Republic of Ireland formed part of the United Kingdom, certain shares, bearer bonds and other securities were settled on E. G. for life with a power of appointment in favour of his wife and children.

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

The settlement contained a very wide investment clause including expressly investment in land in England, but there was no express power to invest in freehold land in Ireland. The settlement was drafted and prepared by solicitors carrying on business in England, and at all material times the bearer shares and other indicia of title were kept in a bank in England, although there was power under the settlement to keep the securities in Ireland. The day-to-day management of the trust and keeping of accounts was in Ireland. At the date of the settlement the domicile of all the parties to it was Irish. It was executed in England. The tenant for life had married in 1903, and by appointments made in 1946 and 1948 he surrendered his life interest in part of the settled property in favour of his three daughters. In 1949 the tenant for life died.

At the date of his death the greater part of the property which had been in the settlement was in Ireland, outside the jurisdiction:—

Held, (1) that the settlement was for the purposes of estate duty governed by the law of the Republic of Ireland;

(2) that section 43 of the Act of 1940, on its true construction, did not admit of the wider definition of property to be found in section 22 (1) (*f*) of the Act of 1894, and that accordingly, having regard to section 43 and the releases of 1946 and 1948, estate duty was exigible on the actual property which was transferred to the daughters at the date of the releases, such property being valued and its local situation ascertained at the date of death.

Sneddon v. *Lord Advocate* [1954] A.C. 257; [1954] 1 All E.R. 255 considered.

ORIGINATING SUMMONS.

By a voluntary settlement dated July 1, 1907, the first Earl of Iveagh settled property consisting of shares in Arthur Guinness, Son & Co. Ld., certain bearer bonds and other securities then worth in the aggregate £269,540, on trust during the life of his son, Ernest Guinness ("the tenant for life") upon protective trusts for his benefit during his life but so that no surrender or release of the deceased in favour of any child or issue should operate to determine the trust in his favour and after the death of the tenant for life subject to a power of appointment in favour of any wife of the deceased upon trust for all such or more exclusively of the others or other of the children of the deceased as the deceased should from time to time by any deed or deeds revocable or irrevocable or by will or codicil appoint and in default of and subject to any such appointment upon the further trusts therein declared.

The settlement contained a very wide investment clause in the following terms: "The trustees shall have power exercisable "from time to time in their uncontrolled discretion:—(1) To "retain the trust premises or any part thereof in their existing

1954

IVEAGH
v.
INLAND
REVENUE
COMMISSIONERS.

"state of investment for the time being without responsibility "for any loss arising thereby or to sell the same or any part "thereof and to invest all moneys from time to time requiring "investment in or upon: (a) Any of the stocks funds or securities "of or guaranteed as regards principal or interest or a minimum "rate of interest and either permanently or for a limited period "by the Government of the United Kingdom India any Colony, "Dependency or possession of the United Kingdom, the United "States of America, Egypt, France, the German Empire, "Prussia or Holland or any municipal corporation or public body "or authority in any of those countries having power to levy "rates tolls dues or taxes. (b) Freehold, copyhold, leasehold or "chattel real securities in England or Wales or any British "Colony or the United States of America such leasehold "securities having not less than fifty years unexpired at the time "of investment. (c) Stocks or securities of or guaranteed as "aforesaid by the Bank of England or the Bank of Ireland. "(d) Debentures and debenture or rent charge or guaranteed "stocks or securities of any railway dock canal gas water or "lighting or power company in the United Kingdom or any "British Colony or Dependency or of any commercial industrial "financial or other company incorporated in the United King- "dom. (e) Preference stock or preference shares of any railway "or tramway company in the United Kingdom which shall have "paid dividends on its ordinary capital at the rate of at least "3 per cent. per annum during each of the five years immediately "preceding the investment or the ordinary stock or shares of "any railway or tramway company in the United Kingdom which "is leased to or worked by any other company at a fixed rent or "a rent varying only with gross receipts. (f) First mortgage "gold bonds of any railway company in the United States of "America. (g) Any of the stocks or securities specified in the "schedule hereto and (h) Securities to bearer or passing by "endorsement and delivery of any of the specified classes and to "transpose all or any such investments for others and it shall "not be obligatory to make any reservation or allowance out of "the income to replace capital invested in any security which is "wasting or redeemable at a price below that at which the "same may have been acquired. . . . (3) To deposit any deeds "bonds shares and securities to bearer with any bankers or "company for safe custody or receipt of interest or dividends "and to pay out of the income of the trust premises for such "custody."

The settlement was drafted and prepared by the settlor's English solicitors, Travers, Smith, Braithwaite & Co., carrying on business in London. At all material times all the bearer shares and other indicia of title were kept in a bank in England, although there was power under the settlement to keep the securities in Ireland. The day-to-day management of the trust and the keeping of the accounts was in Ireland. Of the parties to the settlement, the settlor was not expressed to be of any address, the tenant for life (also one of the trustees) was expressed to be of Dublin, and the two remaining trustees were both expressed to be of London. The domicile of all the parties was Irish. The settlement was executed in London.

By a memorandum dated December 15, 1908, certain investments were added to the settlement funds.

By an indenture dated April 21, 1909, power was given to the trustees to extend the range of investment. By a further memorandum dated March 5, 1910, a further sum of £100,000 Guinness ordinary stock was added to the settlement fund. The tenant for life was married in July, 1903.

By a deed of appointment and surrender dated September 14, 1946, the tenant for life appointed that £150,000 ordinary stock in Arthur Guinness, Son & Co. Ld. subject to the trusts of the settlement should be held upon trust as to one-half thereof for his three daughters, Mrs. Aileen Plunket, the Marchioness of Dufferin and Ava, and Lady Oranmore and Browne, in equal shares and as to the other half for any issue of his three daughters per stirpes, and thereby released his life interest in the stock.

By a further deed of appointment and surrender dated February 19, 1948, the tenant for life appointed that the remainder of his trust fund subject to the trusts of the settlement should be held in trust for his three daughters absolutely and thereby released his life interest in the trust fund.

The tenant for life died on March 22, 1949. At the time of his death, the greater part of the property which had been in settlement was situated in the Republic of Ireland, outside the jurisdiction.

By this summons the court was asked to determine: (1) the proper law of the settlement; (2) whether on the true construction of section 43 of the Finance Act, 1940, any property released from the trusts of the settlement and the memoranda and transferred to the three daughters of the tenant for life, after the determination of his life interest therein, was property that was deemed to pass on the death of the tenant for life notwithstanding any sale or exchange of the assets thereof by the daughters.

Charles Russell Q.C. and *R. O. Wilberforce* for the plaintiff trustees.

Geoffrey Cross Q.C., *J. H. Stamp* and *J. W. Brunyate* for the Commissioners of Inland Revenue.

Victor Hallett for the three daughters of the tenant for life.

The arguments on the first question are set out in the judgment.

UPJOHN J. This is a summons by the trustees of a settlement dated July 1, 1907, taken out under the provisions of the Administration of Justice (Miscellaneous Provisions) Act, 1933, against the Commissioners of Inland Revenue for the determination of a number of questions relating to the liability, if any, of the trust property to estate duty on the death of the tenant for life under the settlement. Part of the trust property consists of £75,000 ordinary shares in an English company known as Arthur Guinness, Son & Co. Ld., which I will refer to as Guinness, but those shares are registered upon the register kept by the company in Dublin, and are therefore locally situated out of the jurisdiction.

In order to ascertain whether estate duty is exigible upon those shares, the first question to be ascertained is what is the proper law applicable to the settlement. The settlement was made between the then Viscount Iveagh, who was afterwards the first Earl, whom I will call the settlor, not expressed to be of any address, of the first part, and Arthur Ernest Guinness, whom I will call Mr. Ernest Guinness, expressed to be of Dublin, of the second part. He was the second son of the settlor. The parties of the third part were the trustees, and they were Mr. Ernest Guinness and his two brothers, Rupert Edward Cecil Lee Guinness, the present Lord Iveagh, and Walter Edward Guinness, who later became Lord Moyne, both expressed to be of addresses in London. As appears from the recital, the settlement was a voluntary settlement. It provides for the trust property to be settled during the life of Mr. Ernest Guinness upon protective trusts for him; but he had a power of surrendering his life interest in the trust property, or in any part thereof, in favour of a wife or issue without creating a forfeiture.

After the death of Mr. Ernest Guinness there were the usual trusts to appoint among his issue and subject to that power of appointment upon trust for his children. If there should be no children or persons taking under the power of appointment, then the trust property was to be held upon the trusts of certain settlements executed on the same day in favour of Mr. Ernest Guinness's two brothers, Lord Moyne and the present Lord Iveagh. The investment clause [clause 9] is of some importance. [His Lordship read it and continued:]

The investments which were settled are set out in the schedule, and they included £60,000 nominal of Guinness 6 per cent. cumulative preference stock. That was the well-known brewing company. It was an English company, having been incorporated in England in the latter part of last century, but in 1907 it was carrying on its business wholly in and about Dublin on the banks of the Liffey. There were also 250,000 dollars of general mortgage 4 per cent. gold bonds in an American railway. There were 1,000,000 marks in some German Imperial Loan, and £42,000 of first mortgage bonds in a Canadian railway company, and some £40,000 of sterling 3½ per cent. bonds in another American railway; all the investments, except the Guinness investment, were in bearer bonds, and were kept in England.

As appears from the witnesses to the various signatures, all the parties appear to have executed the settlement in England.

On December 15, 1908, certain investments were added to the settlement funds, and there was a short declaration to that effect signed by the settlor and by the trustees. Those seem to have consisted of certain colonial stocks and some English and American railway stocks. In 1909 there was an indenture dated April 21 of that year which extended the range of investment, and certain indemnities were given. On March 5, 1910, a sum of £100,000 Guinness ordinary stock was added to the settlement fund, and a short declaration was signed by the settlor and by the trustees.

The first question which I have to consider is what is the proper law of the settlement. That is a question which is not easily answered. I think that I need only refer to a very short passage in the judgment of Lord Greene M.R. in *Duke of Marlborough* v. *Attorney-General* (*No.* 1).[1] The Master of the Rolls, after considering a statement of Lord Cranworth in *Wallace* v. *Attorney-General*,[2] said: "If the principle laid down "by Lord Cranworth in the case of wills is applied to the case "of a marriage settlement, the result does not appear to us to

---

[1] [1945] Ch. 78, 83; 61 T.L.R. 159; [1945] 1 All E.R. 165.

[2] (1865) L.R. 1 Ch. 1, 7, 8.

"admit of doubt. In the case of a will the law under which title "is claimed is the law of the domicile. In the case of a marriage "settlement the law under which title is claimed is the law "which governs the settlement. This law can only be the law "by reference to which the settlement was made and which was "intended by the parties to govern their rights and liabilities. "There is, as it seems to us, a precise analogy between the law "of the domicile in the case of wills and what is conveniently "called 'the proper law' of the settlement in the case of marriage "settlements. What is the proper law of the settlement may, of "course, give rise to controversy as it has done in the present "case, and the question what weight ought to be given to the "various factors which may properly be taken into consideration "may not always admit of a ready answer, but the principle that "the matter to be ascertained is the proper law of the settlement "appears to us to flow inevitably from Lord Cranworth's original "decision." The same principles apply, in my judgment, to a voluntary settlement.

I do not propose to trace the history of changes of investments referred to in the accounts of the trustees, nor to changes of trustees, for as Lord Greene M.R. pointed out in the *Duke of Marlborough* case,[3] subsequent changes of trustees and subsequent changes of investments cannot really alter the proper law of the settlement, at any rate unless you have the concurrence of all the beneficiaries in agreeing to the change of the proper law and virtually making a new settlement. That is not suggested in the present case.

Mr. Ernest Guinness, the life tenant, died on March 22, 1949, having made a number of appointments pursuant to the powers conferred upon him, and he released his life interest in the appointed properties, but, unfortunately for the Guinness family, within five years of his death.

I have to consider what are the relevant circumstances at the date that the settlement was made in 1907. First of all, what was the nature and situation of the property settled by the settlement? I do not think that that really throws any light upon the matter I have to consider. There were investments in all parts of the world—in America, in Canada, in Scotland, and, of course, largely in Guinness. In this case there is no question of matrimonial domicile, but in my judgment it is relevant to consider what was the domicile of the settlor and of the parties who were to be benefited by the settlement. With regard to the settlor that is a matter of much difficulty. The facts relating to the domicile of the settlor were very fully investigated and are set out in *Earl of Iveagh* v. *Revenue Commissioners*.[4] In that case claims were being made for very large sums by way of income tax and super-tax or surtax by the Irish authorities, and the question arose as to the domicile of the settlor at that time. I have been referred to the statement of facts. As they are set out in the report, I do not think that it is necessary for me to refer to those facts in detail. But there are one or two facts on which reliance was placed by the Crown, and I must therefore give a brief summary for the purposes of this case. The settlor's domicile of origin undoubtedly was Irish. He managed the business of Guinness, which was his own property until about 1886 when the company was formed in England, and he became its first chairman. He resigned from the board in 1890, but rejoined it in 1897 and again became chairman in 1902, and remained chairman for many years. He had a large establishment at St. Stephen's Green in Dublin, which he occupied throughout his life. He had for many years and at all material times a house and property called Farmleigh, a country property just outside Dublin. In 1915—that is after the date of the settlement—he acquired from his brother Lord Ardilaun under his will a large property in Galway known as the Ashford Estate. However, he spent much time in England. He had a house in Berkeley Square from 1871. Then in 1877 he acquired No. 5, Grosvenor Place. Subsequently, in 1890, he purchased another house next to it and had them reconstructed as one. At the end of last century he acquired a very large estate at Elveden in Suffolk. It would appear at that time that the preponderance of his life was in England, but he frequently visited Ireland. He kept up the properties I have mentioned in Ireland throughout his life, and he held various public appointments there, being appointed Deputy Lieutenant for the County of Galway in 1915. The question of his domicile was never solved for the purposes of estate duty when he died in 1927, the matter being compromised. But there is no doubt that in 1890 he transferred all his business papers, certificates and financial papers in the custody of his Irish bank to his London bank. Subsequently to 1890 there is no doubt that the settlor, his wife and his children—those are the three brothers who are the trustees of the settlement—while they were growing up resided habitually in England, but they paid frequent visits to Ireland. I do not think that the matter can be summarized more accurately than by saying that the preponderance of the settlor's life was in England. But, of course, that does not determine the question of his domicile.

---

[3] [1945] Ch. 78.

---

[4] [1930] I.R. 386.

In 1907 the position seems to me to be this: the settlor had a domicile of origin which was undoubtedly Irish; it has never yet been established that he changed or abandoned that domicile of origin and acquired a domicile of choice in England. I think that I must deal with this matter upon the footing that the settlor was at the time of the settlement a domiciled Irishman though spending most of his time, and having many business and social interests, in England.

Mr. Ernest Guinness was, if I may put it colloquially, the most "Irish" of the brothers. At this time he was a young married man—he was born in 1876. He had married in 1903, and at the time of the settlement of 1907 he had two children, now Mrs. Plunket and Lady Dufferin, the first being born in 1904 and the second in 1907. Later there was a third child, now Lady Oranmore and Browne, who was born in 1910. Mr. Ernest Guinness's domicile of origin was undoubtedly Irish, and it is accepted by the Crown that he never acquired another domicile. He remained of Irish domicile all his life. At the time of the settlement he was living entirely in Ireland, and he had no house in England, although in 1910 he acquired a large house, No. 17, Grosvenor Place, in London. But he was at the time of the settlement wholly domiciled and resident in Ireland. With regard to his two brothers, all that I know about them is that in 1907 Lord Moyne and the present Lord Iveagh had large business interests both in England and in Ireland, and used Dublin and London indiscriminately as their headquarters for social and business purposes, but both of them, so far as the evidence goes, had domiciles of origin in Ireland, and both of them had, so far as I know, not acquired at that time a domicile of choice in any other place, although it is admitted that Lord Moyne, who died many years later in 1944, had then acquired a domicile of choice in England. That seems to me the situation with regard to the parties to this settlement.

There is a further relevant matter to be borne in mind. The form and contents of the settlement have always been a matter of great importance in determining the proper law of the settlement. It is frequently decisive of the matter, as it really was in the *Duke of Marlborough* case.[5] In that case the contest was between English law and the law of the United States, of the State of New York, as to which was the proper law. Upon that it was found that the settlement was appropriate to English law, and the phraseology used was quite inappropriate to the law of New York. That factor is almost decisive in these cases, but unfortunately in this particular case in 1907 the law of England and of Ireland was identical. There was only one government, that is, of the United Kingdom, one revenue authority, one common law, and one statute-making body. Therefore, it is conceded in this case that the form of the settlement is equally appropriate to England or Ireland.

But it is pointed out that in clause 9 (1) (b) of the settlement there is what I may call some measure of discrimination against Ireland, because express power is given to invest in "freehold, "copyhold, leasehold or chattel real securities in England or "Wales or any British Colony or the United States of America," but not in Ireland. However, Mr. Russell makes the point that, there being no express exclusion of Ireland, there would in fact be power to invest in such securities in Ireland under the Trustee Act, 1893. Apart from that investment clause there is little light thrown on the matter, except that in subclause (c) power is given to invest "in stocks or securities of or guaranteed as aforesaid "by the Bank of England or the Bank of Ireland." Perhaps, if this was an English settlement, one would not expect mention of the Bank of Ireland. Further than that I do not think that the contents of the settlement throw any light on the matter.

There are three other matters strongly relied upon by the respective sides as being of importance. The first one is that it is admitted that the settlement was drafted and prepared by Travers, Smith, Braithwaite & Co., solicitors, carrying on business in London. Secondly, it is admitted that at all material times all the bearer shares and other indicia of title were kept in a bank in England, although there was power under the settlement to keep the securities in Ireland had that been desired.

On the other hand, it is admitted that the day-to-day management of the trust and the keeping of the accounts was in Ireland. The secretary to Mr. Ernest Guinness said this in his affidavit: "Soon after the execution of the settlement I "took over the accounts of the settlement. The accounts were "kept by me at Mr. Ernest Guinness' residence Glenmaroon,

---

[5] [1945] Ch. 78.

"Chapelizod, Co. Dublin. Mr. H. T. Bliss joined me as assistant "secretary in 1929 and I gradually handed over to him the "accountancy of the trust which he has handled ever since. He "did this work partly at Glenmaroon aforesaid and partly at 17 "Grosvenor Place, London," which was the London address of Mr. Ernest Guinness.

In that state of affairs, what is the proper law of the settlement? It is indeed a difficult matter. It is in a sense a hypothetical question because in 1907, as I have already pointed out, England and Ireland were all one country, and the question of whether the law of Ireland or the law of England governed the matter was not a real question. Nor in my opinion would it be right to allow the matter of forum for the administration of the estate trust to enter into the matter, for this reason: it is quite plain that if any beneficiary had desired to sue the trustees for some breach of trust, he could, in the circumstances of this case, have sued according to his choice either in Ireland or in England, because two of the trustees at all times and all the trustees from 1910 onwards had residences both in Ireland and in England, and could have been sued at will in either place.

Mr. Russell, for the trustees, submitted that what is decisive in this case is that the domicile of all parties, so far as can be ascertained, was at the time Irish, but, he said, what is more important is that the principal beneficiary and his family—that is Mr. Ernest Guinness—were then not only domiciled but resident wholly in Ireland. He submitted that as in a marriage settlement the matrimonial domicile is of importance, so here the domicile of a family to be benefited by the settlement must be a matter of great importance. He pointed out that the accounts were kept in Dublin, and he argued that the fact that the settlement was drawn in England is really a matter of no importance, for he said it is quite unlike a marriage settlement—and he sought to distinguish *In re Cloncurry's Estate*,[6] to which I must refer later in this judgment—where customarily the solicitors of the intended wife draw the settlement and they put in provisions in the settlement which show it is to be an English settlement; the very fact, he said, that they draw the settlement shows that they desire it to be English. Mr. Russell submitted that the same principle cannot be applied to the present case where (he said) it was a matter of pure chance whether Lord Iveagh went to his Irish or to his English solicitors. Further, he argued that the fact that the indicia of title were kept in London was quite irrelevant in this case. London has a larger Stock Exchange than Dublin, and in a big trust of this sort, where changes of investment are made from time to time, it would be obviously convenient that the securities should be kept in London, because deals would be more likely to take place on the London Stock Exchange rather than on the Dublin Stock Exchange.

---

[6] [1932] I.R. 687, 707.

On the other hand, Mr. Cross, for the Crown, submitted that the preponderance of evidence was that the settlor intended that the settlement was to be governed by English law, and he relied strongly on the facts that the indicia of title were kept in this country, that the settlor instructed an English solicitor and not an Irish solicitor, and that at that time the preponderance of his life was in England rather than in Ireland. He pointed out and stressed that, if the settlor had wanted Irish law to govern this matter, he surely would have had the settlement vetted by his Irish solicitors. He observed also that there is no express power to invest in securities of Irish land, and he relied on that fact as showing that it was intended that English law should govern this settlement.

He naturally referred to the *Cloncurry* case.[7] That is not a case which, apart altogether from the fact that it was an Irish case, governs this case, because each case in matters of this sort is governed by its own particular facts. However, it was undoubtedly a strong case, and does, I think, lend substantial support to the view submitted by the Crown. The facts, very shortly, were that Lord Cloncurry was domiciled and had his seat in what afterwards became Eire. He was engaged to be married to an English woman, Miss Winn, and her solicitors prepared the settlement. Lord Cloncurry was bringing £14,000 into the settlement, whereas Miss Winn's father, Lord St. Oswald, was only bringing £10,000 into the settlement. On the other hand, the settlement did provide that investments might be made in real or leasehold securities in England or Wales, but not elsewhere. So the argument which Mr. Russell presented to me on the provisions of the Trustee Act was not available in that case. Furthermore, there was express power to purchase messuages, lands, or hereditaments situated in England or Wales being freehold or copyhold, and so on, but there was no power to purchase land in Ireland. The bonds and certificates relating to the trust funds were kept in London. On the other hand, it is clear that the matrimonial domicile there was to

[7] [1932] I.R. 687.

be Irish. But the High Court, consisting of Sullivan P., Hanna and O'Byrne JJ., held that the proper law of the settlement was English, and they held that the investment clause prohibiting investments in Irish real and leasehold securities or the purchase of land in Ireland overrode the other indication which one would have thought was of great importance, namely, that the matrimonial domicile was to be Irish. There is no doubt that in those judgments and in the judgment of the Supreme Court, which was delivered by Murnaghan J.,[8] that fact and the fact that the settlement had been drawn up by English solicitors were treated as of decisive importance. They also relied upon the fact that one of the trustees resided partly in what afterwards became Northern Ireland and in England, the second in England, and the other one being in the Army had no particular residence. That helped to some extent. On the whole it is clear that the Supreme Court felt that the drawing of the settlement by English solicitors was of great importance. I think that that appears from the judgment of Murnaghan J.[9] It is fair to say that in the court below they relied more on the investment clause, and on intentions to keep the trust funds away from Ireland.

I think that that case lends a good deal of support to the Crown's argument, but it comes down to the balance of evidence on the whole matter as to what is to be presumed to have been the intention of the parties as to the law which was to govern the rights and liabilities of the parties and the beneficiaries. I think that it is a very difficult question, but upon the whole I cannot give any real weight to the investment clause here. I cannot ascribe any real weight to the fact that the settlor instructed his English solicitors. The decisive matter here, in my judgment, is that this was a settlement to benefit a family in Ireland, all the parties, so far as can be ascertained, then having an Irish domicile, though with many perhaps overriding interests in England. Upon the whole I think that the proper law of this settlement for the purposes of succession duty, and therefore estate duty, is to be treated as that of the Republic of Ireland.

Then, it being conceded accordingly that estate duty was not payable on property (including that released) which had been transferred to Ireland before the death of the tenant for life, the court then heard argument on the second question.

Charles Russell Q.C. and *R. O. Wilberforce* for the plaintiff trustees. The tenant for life died within five years of the release of his life interest in the settled property and, accordingly, estate duty will be payable in respect thereof by virtue of section 43 of the Finance Act, 1940. It is not disputed that whatever property falls to be taxed must be ascertained and valued as on the death of the tenant for life. The question is what is to be taxed, and the answer depends on the construction to be placed on section 43 of the Act of 1940.[10] By virtue of section 65 (5) of the Act of 1940, Part IV of that Act is to be construed as one with Part I of the Finance Act, 1894. Section 22 [11] in Part I of the Act of 1894, defines the expression " property," and it is submitted that that definition must be imported into section 43 of the Act of 1940, and that, accordingly, the property for the purposes of section 43 must be identified as it existed at the date of the death of the tenant for life.

---

[8] [1932] I.R. 709.

[9] Ibid. 712.

To determine what is " deemed " to pass on the death under section 43, one must be able to predicate of the property that " but for the disposition *it* would have passed." It follows from that that one must be able to predicate that that property must have been one of the constituents of the trust fund at the *date of death.* For the purpose of section 43, therefore, the property cannot be crystallized at the moment of surrender; notionally, the property must still be regarded as trust property up to the date of the death, with the result that it must be identified at that date. Further, where a limited interest is released and is followed by another limited interest, the trust continues in fact with the result that the constituent items of the trust fund must be identified at the date of death. The same consequence should follow where the limited interest, which is released, is followed by an absolute interest.

Victor Hallett, for the three daughters of the tenant for life, adopted the argument put forward on behalf of the trustees.

---

[10] Finance Act, 1940, s. 43: " (1) " Subject to the provisions of this sec- " tion, where an interest limited to " cease on a death has been disposed " of or has determined, whether by " surrender, assurance, divesting, for- " feiture or in any other manner " (except by the expiration of a fixed " period at the expiration of which " the interest was limited to cease), " whether wholly or partly, and " whether for value or not, after " becoming an interest in possession, " —(*a*) if apart from the disposition or " determination the property in which " the interest subsisted would have " passed on the death under section " one of the Finance Act, 1894, that " property shall be deemed by virtue " of this section to be included as to " the whole thereof in the property " passing on the death."

[11] Finance Act, 1894, s. 22: " In " this Part of this Act, unless the con- " text otherwise requires . . . (*f*) the " expression ' property ' includes real " property and personal property and " the proceeds of sale thereof respec- " tively and any money or investment " for the time being representing the " proceeds of sale."

Geoffrey Cross Q.C., *J. H. Stamp* and *J. W. Brunyate* for the Commissioners of Inland Revenue. Section 22 (1) (*f*) of the Finance Act, 1894, does not apply if the context otherwise requires. The form of words used in section 43 of the Finance Act, 1940, is a context which excludes the application of the definition section. *Sneddon* v. *Lord Advocate* [12] shows that the definition section does not apply to gifts inter vivos where the relevant words are "property taken." The property in which the interest subsisted in a section 43 case is a trust fund. If, on a surrender, a beneficiary who is absolutely entitled succeeds to the property, it ceases to be a trust fund. Any alteration in the property, by way of sale or reinvestment after the release, is effected not in pursuance of the terms or provisions of the trust, but in pursuance of the beneficiary's absolute ownership. The property chargeable with duty ought to be fixed at the time of the surrender, otherwise the property in which the "interest subsisted" might be property which could never have formed part of the trust fund, because it could not have been validly held by the trustees of the settlement. Proceeds of sale or reinvestments cannot be property in which the "interest subsisted."

By virtue of the proviso to section 35 of the Finance Act, 1930, where there were sales or exchanges for full value of the actual property transferred, the value of the property representing the actual property after the sales and exchanges was chargeable with duty. There is no comparable provision in section 43 of the Act of 1940, the inference being that the property must be identified at the moment it ceases to be part of a trust fund. Further, where a life interest is released and the property is still held in trust because, for example, it passes to a succeeding tenant for life, the trust fund at the death can still be said to be the trust fund in which the interest released subsisted, notwithstanding the fact that the constituent items, or some of them, may have changed their form. The trust fund retains its identity and, in that case, the property could be identified at the date of death without reference to the definition section.

UPJOHN J. In 1946 and 1948 Mr. Ernest Guinness executed releases of his life interest in part of the property subject to the

[12] [1954] A.C. 257; [1954] 1 All E.R. 255.

settlement. As to part of that property he made appointments to his three daughters under powers conferred upon him by the settlement, with the result that upon the release of his life interest those three daughters took a certain part of the trust property absolutely. Mr. Guinness died within five years of those releases, and, therefore, having regard to the terms of section 43 of the Finance Act, 1940, estate duty became exigible in respect thereof. It is common ground that whatever property falls to be taxed must be ascertained and valued as on the date of the death of Mr. Guinness. The whole question I now have to determine is what is to be taxed.

That depends on the true construction of section 43 (1), including paragraph (*a*). Paragraph (*b*) of that subsection and the remaining subsections of that section were referred to in argument, but in my opinion they do not throw any light upon the matter which I have to consider. By section 65 (5) of the Finance Act, 1940, Part IV of the Act (and section 43 is in Part IV of the Act) is to be construed as one with Part I of the Finance Act, 1894. That brings into play section 22 of the Finance Act, 1894.

The rival contentions of the parties are these. For the Crown it is said that the property to be taxed is the actual property at the moment of release—that is, the actual constituent investments in the settlement at that moment. The remainderman took those properties, and it may be that the remainderman in the interval between the release and the date of death has sold or otherwise disposed of the property which she took. That, the Crown argued, is of no consequence. One must consider the situation of the property at the date of death and value it at that moment. It may be useful to give one or two examples as to how the Crown contends that that submission works in practice. Suppose that the property handed to the remainderman consists of a debenture which is redeemed before the date of death: in that case the Crown concedes that there is no property at the date of death and, therefore, no charge of estate duty. Next, consider the case of a settlement, the proper law of which is outside the jurisdiction (as indeed is the case of this settlement): in that case, the property taken by the remainderman—let us assume it to be a bearer bond—may have been disposed of; the remainderman herself may have taken the property out of the jurisdiction, or a purchaser, whether immediate or mediate from the remainderman, may have done so. In any of those cases again the Crown concedes that the property escapes taxation.

On the other hand, there may be a case where an investment is sold by the remainderman, and after the date of sale, but before the death, the property sold vastly increases in value. In that case, says the Crown, the greatly increased value is subject-matter to be taxed. Curious anomalies arise from construing the section in that way.

The subject's contention is this: having regard to section 22 (1) (*f*) of the Act of 1894 it is necessary to read the definition of "property" in that section into section 43, so that the property in which the interest subsisted is the original property given by the transfer to the remainderman and the proceeds of sale thereof, and any money or investments in the hands of the remainderman for the time being representing the property transferred. Curious anomalies also arise from that construction, although perhaps they are not quite so startling as those which arise from the Crown's contention. In the circumstances, however, I do not think that any guidance is to be obtained from a consideration of the anomalies and hardships that may arise in any given set of circumstances as a result of either construction. It is my duty to give effect to the words of the section as best I can.

During the course of the argument both sides canvassed, and rightly canvassed, the construction of the section in a case which does not directly arise for my decision, where the release does not result in the remainderman taking absolute interests, but where the trusts of the settlement remain in existence up to and possibly beyond the death of the life tenant, the interests of the remainderman merely being accelerated by the release of the life interest. I shall refer to those arguments later in this judgment.

I turn once more to section 43. Section 43 is a "deeming" section. "Deeming" sections are notoriously difficult to construe, and I think that it is fair to say that this particular section has had its fair share of notoriety. It poses a hypothetical state of affairs because "the property" mentioned in the section is property in which the interest subsisting would have passed on the death. Therefore the section appears to contemplate the continuance of a hypothetical state of affairs, that is, a continuance of the trusts of the settlement until the death. No one can tell what property would in fact have passed upon the death, for the trustees might have made changes of investment. Each side says that that circumstance places the other in a dilemma. Apart altogether from authority, it seems to me that "the property" in section 43 must satisfy the test that it would have passed hypothetically upon the death of the tenant for life. What property is that? It might be the property in the actual state of investment that was in fact transferred to the remainderman, for the trustees might never have made any changes of investment. It might have consisted of property which was the result of sale, transposition and re-investment by the trustees of the settlement. I do not see how any other property would have passed upon the death.

The subject's contention involves this, that the property which is deemed to pass on the death includes the property which is or may be the result of a sale and re-investment, and other possible dispositions by, not the trustees, but the remainderman, who is solely entitled. So it is said that the property that would have passed on the death is the property in the hands of the remainderman as a result of the remainderman exercising over that property all her absolute rights as owner. That consideration leads me to the view that it is not possible to read into section 43 the wider definition of property to be found in section 22 (*f*). For, if that section be read into section 43, it seems to me necessarily to follow that it must give a meaning to " property " which goes far beyond the property which would or could have passed upon the death. Therefore, I reach the conclusion that the context does not admit of the application of section 22 to section 43.

What, then, does " the property " mean in section 43? I have already pointed out that in my judgment it must mean either the actual property at the date of release or property which has been transposed by the trustees and no one else. In my judgment, in order to make any sense of the section, that latter class of property must necessarily be rejected. I think there is some support for that view to be found in the opinion of Lord Reid in the recent case of *Sneddon* v. *Lord Advocate*.[1] Lord Reid said: " A gift is taxed on the footing that if the property " given away had not been given the donor would still " have had it at his death. Of course, he might have sold the " property and spent the proceeds; but no one suggests that that " can be considered. Or he might have sold the property and " re-invested the proceeds: where the gift is to an individual " donee no one has suggested that that can be considered. The " re-investment cannot be deemed to have been in the donor's " possession and to have passed on his death." That speech was concerned with the true construction of the Customs and Inland Revenue Act, 1889, incorporated with amendments into section 2

---

[1] [1954] A.C. 257, 279; [1954] 1 All E.R. 255, 267.

(1) (*c*) of the Finance Act, 1894: the particular question under consideration being what was the meaning of the words "property "taken." Nevertheless, I draw some support from the words which I have read from Lord Reid's opinion, and, in my judgment, in considering section 43, one must deal with it on the hypothesis that the property in that section which would have passed is the property which was the actual property that was transferred to the remainderman, and one must assume that it would have remained in the settlement down to the date of death.

In the course of the argument the position where the release to the remainderman does not give the remainderman an absolute interest but the trusts of the settlement remain in effect was much canvassed before me. Both sides agree that, if in that last mentioned case one takes the property in trust at the actual date of the release and tax that and not the property which is in the trustees' hands at the date of death, absurd results would ensue. That was naturally relied upon by the subject as a support for his contention that in such a case section 22 (1) (*f*) must apply to section 43. If it applies in that case, so the argument runs, it must also apply to the case where the remainderman takes absolutely. Speaking for myself, if the matter were res integra, I should have felt little difficulty, in a case where the trusts continue until the death of the tenant for life and without any resort to section 22, in holding that the property mentioned in the section was the "trust property": that is, the property originally constituting the settled funds subject to and with the benefit of the duties and powers vested in the trustees by the trust—including the power of investing money and varying investments so that the property is the trust property as it exists at the date of the death. Again, speaking for myself, I see nothing inconsistent with that interpretation of the word "property" where the trust continues with the interpretation which I have already given to that word where upon the release the trust does not continue, for the simple reason that the conception of the trust property must necessarily come to an end when the property ceases to be trust property, and becomes the absolute property of the remainderman.

This conception of property, meaning the trust property, is, however, a matter which is not free from authority. Simonds J., as he then was, adopted that conception in *In re Payne's Declaration.*[2] That decision was overruled on the meaning of the words "property taken" by the *Sneddon* case.[3] But Lord Morton of Henryton in his speech in that case appears to have approved the concept which Simonds J. found acceptable, although he denied its relevance to the facts before him. Lord Morton said[4]: "I agree also that a trust fund, once constituted, "retains its identity as *the* trust fund held upon certain trusts, "notwithstanding any changes which may be made in the investments constituting it, but that fact seems to have no relevance "in the present case." On the other hand, Lord MacDermott, in the same case,[5] after a very full analysis of the earlier judgments, found himself quite unable to accept the concept of property meaning the trust property as constituted from time to time. In that state of high judicial conflict it seems to me undesirable that I should say more than that that case must be determined as and when it arises.

---

[2] [1939] Ch. 865.

Declaration accordingly.

Solicitors: *Travers Smith, Braithwaite & Co.; Solicitor of Inland Revenue.*

---

[3] [1954] A.C. 257.
[4] Ibid. 266.
[5] Ibid. 267.

TITHE REDEMPTION COMMISSION *v.* RUNCORN URBAN DISTRICT COUNCIL AND ANOTHER.

[1953 T. No. 910.]

1953
Oct. 30.
Danckwerts J.

C. A.
1954
Feb. 19, 22, 23.
Evershed M.R., Denning and Jenkins L.JJ.

Tithe—Tithe redemption annuity—Chargeability—"Estate owner"—Highway authority—Liability to contribute—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *ss.* 7 (1), 205 (1) (v) (ix)—*Local Government Act,* 1929 (19 *&* 20 *Geo.* 5, *c.* 17), *s.* 29—*Tithe Act,* 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 43), *ss.* 10, 17 (1) (3).

Legal Estate—Highway—Statutory vesting in local authority—Determinable fee simple—"Any similar statute"—Law of Property Act, 1925, *s.* 7 (1).

The Local Government Act, 1929, s. 29 (2), provides that certain highways "shall vest" in the local highway authority. Pursuant to section 29 certain highways had vested in the defendant council as the local highway authority. Danckwerts J. held that the council had a legal estate in fee simple in the surface of the highways and was an "owner" within the meaning of section 17 (1)

1953

Tithe Redemption Commission v. Runcorn Urban District Council.

of the Tithe Act, 1936, so as to be liable to contribute to the payment of tithe redemption annuity, on an apportionment being made under section 10 of that Act. On appeal:—

Held, (1) that where before 1926 a highway had been vested by statute in a local highway authority that authority had a fee simple determinable in the highway; (2) that the Local Government Act, 1929, came within the category of a "similar statute" to the Lands Clauses Acts and the School Sites Acts for the purposes of section 7 (1) of the Law of Property Act, 1925; that that category comprised all statutes which vested property in a body for public purposes, with a proviso, express or implied, that such interest should determine if the property should cease to be required for those purposees; and that, accordingly, the defendant highway authority was the estate owner in respect of the fee simple of the highway and liable to pay the appropriate proportion of the tithe redemption annuity.

Rolls v. *Vestry of St. George the Martyr, Southwark* (1880) 14 Ch.D. 785; *Mayor, etc., of Tunbridge Wells* v. *Baird* [1896] A.C. 434; 12 T.L.R. 372; and *Foley's Charity Trustees* v. *Dudley Corporation* [1910] 1 K.B. 317 considered and explained.

Decision of Danckwerts J. affirmed.

ADJOURNED SUMMONS.

The Tithe Redemption Commission took out a summons which raised the question whether the first defendants, Runcorn Urban District Council, a local highway authority in which certain highways were vested under the Local Government Act, 1929, were the "owners" of the highways within the meaning of section 17 (1) of the Tithe Act, 1936,[1] so as to be liable to contribute to the payment of a tithe redemption annuity on an apportionment being made under section 10 of the Act. The second defendants were Imperial Chemical Industries Ld., the owners of the surrounding and subjacent soil.

---

[1] Tithe Act, 1936, s. 10: "Subject "to the provisions of this Act, the "Commission shall, in every case in "which they ascertain that an an"nuity is charged in respect of land "in the ownership of two or more "owners, apportion the annuity as "between the several parts of the "land that are in different owner"ship in such manner as appears to "the Commission to be just and "equitable: . . ."

S. 17 (1): "Subject to the provi"sions of this Act, the person who is "to be deemed for the purposes of "this Act to be the owner of land "shall be—(*a*) the estate owner in "respect of the fee simple thereof, "unless it is subject to a long lease "at a rent less than a rack-rent; . . . "(3) . . . 'estate owner' has the "same meaning as in the Law of "Property Act, 1925. . . ."

Law of Property Act, 1925, s. 7 (1) (as amended by the Law of Property (Amendment) Act, 1926): "A "fee simple which, by virtue of the "Lands Clauses Acts, the School "Sites Acts, or any similar statute, "is liable to be divested is for the "purposes of this Act a fee simple "absolute, and remains liable to be "divested as if this Act had not been "passed and a fee simple subject to a "legal or equitable right of entry or "re-entry is for the purposes of this "Act a fee simple absolute, . . . "(3) The provisions of—(*a*) the For"feiture Act, 1870, in regard to the "land of a convict; (*b*) the Friendly "Societies Act, 1896, in regard to "land to which that Act applies; "(*c*) any other statutes conferring "special facilities or prescribing "special modes (whether by way of "registered memorial or otherwise)

W. F. Waite for the Tithe Redemption Commission.
R. E. Megarry for the Runcorn Urban District Council.
R. L. Stone for Imperial Chemical Industries Ld.

The following cases, not referred to in the judgment of Danckwerts J., were cited in argument: *Municipal Council of Sydney* v. *Young* [2]; *In re Cawston's Conveyance.*[3]

DANCKWERTS J. The question which I have to decide arises in regard to the apportionment of the tithe redemption annuity which the Tithe Redemption Commission, formed under the Tithe Act of 1936, have to apportion under section 10 of that Act and according to the provisions of that section. It is not necessary for me to go into the nature of tithe, which was payable by owners of land under a number of statutes; but tithe rentcharge was abolished by the Act of 1936, a tithe redemption annuity being substituted by that Act instead, which was recoverable by the Crown, and was a debt of the land owner.

[His Lordship read section 10, and continued:] The most important definition of the word "owner," so far as is relevant, is to be found in section 17 (1): "Subject to the provisions of this "Act, the person who is to be deemed for the purposes of this Act "to be the owner of land shall be—(*a*) the estate owner in respect "of the fee simple thereof, unless it is subject to a long lease at "a rent less than a rack rent; . . ." Subsection (3) provides that "'estate owner' has the same meaning as in the Law of "Property Act, 1925, so, however, that in relation to such an "agreement as aforesaid that expression means the person entitled "to have vested in him the legal term agreed to be created; . . ." So we must refer to the Law of Property Act, 1925. Section 205,

"for disposing of or acquiring land, "or providing for the vesting (by "conveyance or otherwise) of the "land in trustees or any person, or "the holder for the time being of an "office or any corporation sole or "aggregate (including the Crown); "shall remain in full force.

"This subsection does not authorize an entailed interest to take "effect otherwise than as an equitable interest."

S. 205 (1) (v): "'Estate owner' "means the owner of a legal estate, ". . . (ix) 'Land' includes land of "any tenure, . . ."

[2] [1898] A.C. 457.

[3] [1940] Ch. 27; 56 T.L.R. 39; [1939] 4 All E.R. 140.

the definition section, contains a definition of "estate owner" which looks almost like a joke, as subsection (1) (v) says: "'Estate owner' means the owner of a legal estate," so that does not carry one further, except that it says that he has a legal estate. I must also refer to sub-paragraph (ix), which refers to the definition of "land." The only point on that sub-paragraph is that it is evidently considered that there may be ownership of land divided from the ownership of the surface. At any rate, it is clear that "land" may include a portion of the land, either the surface or divided from the surface.

The real question which I have to decide is whether the highway authority in the present case is an estate owner, that is to say, the owner of a legal estate. There is, of course, a great deal of case and statute law on the subject of highways and the position of highway authorities. It is well settled, and there is really no dispute about the position of a highway authority. The highway authority does not hold the whole of the soil upon which the highway is found, that is to say, down to the centre of the earth and up as far as possible above the earth. *The Mayor, etc., of Tunbridge Wells* v. *Baird*[1] illustrates that very well. A highway authority simply owns the surface of the land and so much of the land below the surface, or indeed above the surface, as may be necessary for it to carry out its duties in respect of highways. It has been held that a highway authority has not sufficient ownership in the soil below the highway to enable it to construct underground lavatories in that portion of the land. On the other hand, it was held in *Foley's Charity Trustees* v. *Dudley Corporation*[2] that a highway authority had such ownership as to be made liable as terre tenant for the payment of a rentcharge which was payable out of and issuing out of the land which included the site of the highway. It has, however, been very correctly pointed out by Mr. Megarry, who appears for the highway authority in the present case, that that case is not conclusive of the position of a highway authority at the present time, because in 1910, when that case was decided, there might be a legal estate of a more limited character than the fee simple. The highway authority in that case might have been merely a life tenant, or the owner of something which was only leased for a limited time. The Law of Property Act, 1925, has reduced the kinds of legal estate which may exist, practically reducing them to a fee simple absolute in possession and a term of years absolute, with which I am not concerned. Therefore, the present question is whether the interest or ownership of the highway authority in the land in question is of such a kind as to amount to a fee simple absolute in possession.

---

[1] [1896] A.C. 434; 12 T.L.R. 372.

[2] [1910] 1 K.B. 317.

It has been held in *Rolls* v. *Vestry of St. George the Martyr, Southwark*,[3] that when a highway ceases to be a highway owing to operation of law, that is to say, when it is closed or diverted by order of the justices, the ownership of the land which was previously in the highway authority comes to an end. It therefore appears that the ownership of the highway authority of land which it holds for the purposes of its duties may come to an end in that manner and, therefore, it is not necessarily a fee simple which is bound to last for ever. But it is, of course, an ownership which normally would last for a very long time, and is very seldom ended by the closing or diversion of the highway. It seems to me that the relevant provision of the Law of Property Act on which the matter depends is section 7 (1), which is dealing with a terminable estate.

[His Lordship read section 7 (1), and continued:] It is argued by Mr. Megarry that this subsection does not save the interest of the highway authority so as to make it a legal estate in the present case because the possibility of reverter in the present case is not of a kind mentioned in this subsection. He points out that in the case of the Lands Clauses Consolidation Act, 1845, and the case of the Schools Sites Act, 1841, there are express provisions providing that when the land ceases to be used for the purpose of a school, or whatever it may be, it shall revert either to the owner or the adjoining tenant, or something of that sort. There is, of course, nothing to that effect necessarily mentioned in any conveyance, but the express provision of these Acts comes into effect on the event which is mentioned. In the present case Mr. Megarry says that there is no express provision for reverter to be found in any of the highway Acts and, therefore, the highway Acts do not amount to a similar statute. I am not satisfied with that argument. It seems to me that the subsection was intended to deal with a situation of a general kind which includes the position in regard to a highway. In my view the highway Acts are "similar," in that, while they do not contain express provisions for reverter, they do, as the result of the case law which has been founded upon them, vest in highway authorities an estate which is determinable in the event of the land in question ceasing to be a highway. In my view, therefore, there is a situation of the kind which is intended to be covered, and is covered, by section 7 (1) of the Law of Property Act, 1925. That being so, in spite of the possibility of the termination by certain events of the ownership of the highway authority, that authority has a legal estate. It seems to me it would be an extremely unfortunate and unexpected result if these provisions were so construed that a highway authority had no legal estate at all. I feel convinced that this subsection was intended to cover the case of highway authorities as well as other persons who acquire land in a statutory manner. Accordingly, I come to the conclusion that in the present case the defendants, the Runcorn Urban District Council, fall within the definition of " owner " in section 17 of the Tithe Act, 1936, and, therefore, are included in the persons in respect of whom an apportionment should be made by the Commission under section 10 of the same Act.

---

[3] (1880) 14 Ch.D. 785.

F. R. D.

The Runcorn Urban District Council appealed.

Charles Russell Q.C. and *R. E. Megarry* for the Runcorn Urban District Council. The qualified vesting of the street in a highway authority does not constitute the authority an estate owner in respect of any part of the land which is subject to the tithe redemption annuity. There is a distinction between a statutory vesting and a grant, and it is not in issue that this road " vested " in the council. The character of the rights conferred on the authority is not, in the broad sense, recognizable as an ownership of the fee simple in land, and in the narrow sense it is not within the relevant statutory definitions.

Section 17 of the Tithe Act, 1936, defines " owner " by reference to the Law of Property Act, 1925. The definition of " legal " estates " in section 205 (1) (x) of the Act of 1925 throws one back to section 1. By section 1 (1) the only legal estate in land which is now capable of existing (apart from a term of years) is an estate in fee simple absolute in possession. Therefore, if the highway authority is an owner of land for the purposes of the Tithe Act, 1936, it must be shown that they have an estate in fee simple absolute.

The interest vested in the authority by statute is clearly not a fee simple absolute within section 1 (1), because it is determinable in certain circumstances: for example, if the highway should at any time be stopped up, the interest of the Imperial Chemical

Industries in the surface of the road would reassert itself. Section 7 of the Act of 1925 provides that certain statutory interests are to be deemed to be estates in fee simple absolute, notwithstanding that they are liable to be divested, but this interest is not within that provision. The statutes referred to in section 7 (1) provide for the transfer in the ordinary conveyancing sense of the whole property for certain purposes, whereas here the authority has only a terminable interest in the surface in order to carry out the statutory functions; even the area which is subject to those rights is not susceptible of exact definition, and the owners of the subjacent soil can do anything which is not inconsistent with those rights. [Reference was made to Pratt & Mackenzie, Law of Highways, 19th ed., p. 52.] The interest created by statute is somewhat anomalous, but it is not a fee simple absolute.

The interest of a highway authority is sufficient to maintain an action for trespass. It cannot, however, be said that there are now two estates in fee simple in this land. The Imperial Chemical Industries are the fee simple owners of the whole of the property. Their rights may be restricted, but it is possible to have a fee simple ownership although, for a time, the only right of the owner is to sell the reversionary interest. *Rolls* v. *Vestry of St. George the Martyr, Southwark*,[1] is relevant on the broader point that the interest of the highway authority is not something which in the ordinary sense could be regarded as a fee simple, and it is also in point on the definition of owner, as showing that the interest of the highway authority is quite different from the interests contemplated in section 7 of the Act of 1925. The vesting of the highway is a statutory conception and, as is shown by *Rolls* v. *Vestry of St. George the Martyr, Southwark*,[1] the interest created may of its very nature come to an end without there being any formal divesting as is contemplated by section 7.

Before the Law of Property Act, 1925, came into operation, an interest in fee simple liable to determine automatically on failure of the purpose for which it was created was an interest known to the law. But that Act turned it into an equitable interest. It became settled land, and the person entitled to the interest was in the position of a tenant for life. But here the notional tenant for life would be the highway authority, and the statutory interest which is vested in them carries with it none of the powers of a tenant for life. It is, therefore, clear that this is a peculiar and somewhat anomalous creation of statute. Before 1926, although the interest of the authority was more than a mere easement, as James L.J. said in the *Rolls* case [2] in referring to *Coverdale* v. *Charlton*,[3] and the authority had sufficient interest in the land to let the herbage and take proceedings in trespass or nuisance, they had not a right of property which could be described as a fee simple. Farwell J., in *Hertfordshire County Council* v. *Lea Sand Ld.*,[4] said that the interest was not a fee simple. Elsewhere it has been called a "statutory fee simple." If the highway is blocked the subject-matter of the vesting, physically, remains, but the interest of the highway authority determines automatically. The vesting is not tantamount to a statutory conveyance of the land bounded by the street, and the highway authority has no ownership in the ordinary sense. It is not necessary to show who is now the legal owner of the land nor to define the exact limits of the area affected by the vesting. [Reference was made to *Mayor, etc., of Tunbridge Wells* v. *Baird*.[5]]

---

[1] (1880) 14 Ch.D. 785.

"Ownership of land" in the Tithe Act, 1936, is used in the ordinary conveyancing sense, and where the land is spoken of as being in the ownership of two persons, the Act is referring to the position which arises if a land owner conveys part of the land to a purchaser. The right of the authority is something in the nature of a right of property: see *Municipal Council of Sydney* v. *Young*,[6] but, apart from the Law of Property Act, 1925, it is clear that the authority have no ownership of the land in the sense in which Imperial Chemical Industries own the adjoining land. [Reference was made to *Commissioners for Land Tax for the City of London* v. *Central London Railway Co.*[7]]

The interest is not within the definition of legal interest in the Act of 1925, which is incorporated into section 17 of the Act of 1936. It is not within section 1, first because it is not an interest in land but in the road, and secondly, because it is determinable. Section 7 of the Act of 1925 is not relevant, for what is referred to in section 17 of the Act of 1936 is the estate owner; the owner of a legal estate which subsists as such under section 1 of the Act of 1925. [Reference was made to *Hertfordshire County Council* v. *Lea Sand Ld.*[8]] In *Foley's Charity Trustees* v. *Dudley*

---

[2] 14 Ch.D. 785, 795.

[3] (1878) 4 Q.B.D. 104.

[4] (1933) 98 J.P. 109, 112; 32 L.G.R. 279.

[5] [1896] A.C. 434; 12 T.L.R. 372.

[6] [1898] A.C. 457.

[7] [1913] A.C. 364, 372, 379.

[8] 98 J.P. 109, 112; 32 L.G.R. 279.

Corporation[9] the test was different. There the liability attached to the freehold; and it was sufficient to find an estate of freehold.

Section 7 (3) (*b*) of the Act of 1925 saves certain statutory provisions, but the test for the purpose of the Tithe Act, 1936, is whether the authority is the owner of one of the legal estates referred to in section 1 of the Act of 1925. Section 7 (1) of the Act of 1925, on the other hand, refers to a fee simple. In the Acts mentioned in section 7 the usual conveyancing considerations apply. The interest conveyed is a full perpetual fee simple, but each statute provides for divesting the interest by express reverter clauses. See Lands Clauses Act, 1845, s. 120; School Sites Act, 1841, s. 2; Places of Worship Sites Act, 1873, ss. 1, 4; Literacy and Scientific Institutions Act, 1854, s. 4. The statute vesting the highway in the authority is not "similar" to those mentioned in section 7 of the Act of 1925. There is an essential distinction between an interest which lasts until a point of time, even if that time may perhaps never come, and an interest which is liable to be cut off, but, if not cut off, will be perpetual. Section 7 (1) deals with the latter type of interest, but the interest of the highway authority is of the former type. Section 7 is directed to questions of conveyancing and is wholly irrelevant in considering the limited rights of the highway authority where there is no question of the authority being able to convey their interest. The essence of the interest vested in the authority is that it is inalienable and, therefore, there was no need to turn it into a fee simple absolute for conveyancing purposes by section 7.

R. E. Megarry following. The concluding words of section 7 (1) of the Act of 1925 were added by the amending statute to get over difficulties which had arisen in districts where fee farm rents coupled with a right of re-entry were common; they have no application here, for the interest of the authority is not subject to a right of re-entry but may terminate of its own accord in certain events.

A conveyance under the statutes mentioned in section 7 (1) has the following points of dissimilarity, when compared with the statutory vesting of the highway in the authority. First, the fee simple is conveyed by the ordinary methods of conveyancing, whereas the highway is vested by statute. Second, the full fee simple is transferred. It is not determinable or qualified. The fee simple is, admittedly, liable to be divested, but, unless

---

[9] [1910] 1 K.B. 317.

C. A.
1954

TITHE REDEMPTION COMMISSION v. RUNCORN URBAN DISTRICT COUNCIL.

it is so divested, it remains the full fee simple. The highway authority, on the other hand, has only a determinable fee. If the event happens on which that interest determines, the interest disappears. The fee simple interest which was subjected to the vesting then continues as it was before the vesting. Third, the conveyance can be made voluntarily or in return for compensation. The land is not taken away willy-nilly from the landowner. Fourth, the interest passing under the Acts mentioned is the estate in the whole of the land concerned ad caelum et ad inferos. The interest vested in the highway authority, on the other hand, is an ill-defined slice with no definite indication of depth or height. Fifth, the Acts mentioned contain express provisions for reverter, but there is no provision for reverter in the case of a highway vested by statute.

Section 7 (3) is purely a saving provision. It is directed to saying that the statutes shall remain in full force; not the "estates." The new scheme in the 1925 legislation of reducing the number of legal estates in land was not to interfere with the operation of these other statutes, but the provision does not go beyond that. It leaves undertermined what is the nature of the rights conferred by the statutes.

The question is, what is the nature of the right conferred on the highway authority? It may be that it is a "statutory right "in the nature of a fee simple," but it is not, and never was, a right which is known to ordinary conveyancing. It is a pure creature of statute and, therefore, it is irrelevant to consider whether the provisions of the Settled Land Act, 1925, apply. Subject to the rights abstracted, the full legal ownership remains in the land owner. It is true that the word "vest" is used, but that has been used in cases where an unusual right of property has been created by statute. Here it is not the land which has vested, but the road.

The Law of Property Act, 1925, was a consolidation Act. If subsection (3) of section 7 is traced back, its origin is to be found to be section 29 of the Law of Property Act, 1922, included in Part I of that Act under the heading "Savings and "Reservations." It is a general saving provision and does not cut down the effect of section 1. All that a highway authority gets under the provisions of the Local Government Act, 1929, is an anomalous statutory right, a kind of statutory interest, the legal estate remaining in adjoining landowners. The interest of the highway authority does not fall within the definition of "settled land" in the Settled Land Act, 1925. Paragraph (c) of section 7 (3) of the Law of Property Act, 1925, is not directed to the quality of the estate which passes to the highway authority. It is merely a survey of statutory powers. The interest of the local authority is not registrable as a land charge. A purchaser could not take without notice, because of the presence of the road. A highway authority has a statutory right which is sui generis. The *Foley* case [10] is distinguishable from this case. [Reference was also made to the Road Traffic Act, 1930, s. 56; *Medway River Navigation Co.* v. *Romney (Earl)*,[11] and *Brumfitt* v. *Roberts*.[12]]

Geoffrey Cross Q.C. and *W. F. Waite* for the Tithe Redemption Commission. Before 1926 land could be conveyed to a grantee subject to a limitation over upon an event which might never happen. A determinable fee with a possibility of reverter was known to the law: Challis, Real Property, 3rd ed., p. 251. Before 1925 a landowner might lay out and dedicate a road as a highway and convey it to the highway authority. So long as it remained a highway that was the effect of the vesting provisions of the Highway Acts. The courts might have held that the effect of those Acts was merely to give to the highway authority an easement without any freehold proprietary interest. The courts held, however, that the vesting provisions in those Acts conferred a freehold interest on the highway authority. That appeared from the decision in *Foley's Charity Trustees* v. *Dudley Corporation*.[13] The highway authority was there held to have an interest known to the common law. In *Coverdale* v. *Charlton* [14] it was held that the highway authority had such a right as enabled them to let the grass verges. Those authorities show that the highway authority had a determinable fee in the common law sense. That appears also from the judgment of James L.J. in *Rolls* v. *Vestry of St. George the Martyr, Southwark*.[15] There is nothing in *Mayor, etc., of Tunbridge Wells* v. *Baird* [16] which throws any doubt on the highway authority's title to the surface. The authorities establish that, until the coming into operation of the Law of Property Act, 1925, a highway authority had a legal estate at common law. The highway authority's interest is a fee simple absolute in possession within section 7 (1) of the Law of Property Act, 1925. If that is wrong, then the highway authority has an equitable fee simple determinable to which the provisions of the Settled Land Act, 1925, apply. If section 7 of the Law of Property Act, 1925, does not save the legal estate in highways, and the interest of the highway authority has become an equitable fee simple determinable, the authority would be entitled to have a vesting deed executed in its favour in respect of the highway. On this footing, the Local Government Act, 1929, which states that a highway " shall vest " in the highway authority creates a settlement, the Act being the trust instrument. [Reference was made to the Settled Land Act, 1925, ss. 2, 4, 9, 20 (1) (iii).] It is not possible to have an equitable fee which is not within the provisions of the Settled Land Act, 1925.

---

[10] [1910] 1 K.B. 317.

[11] (1861) 9 C.B.(N.S.) 575.

[12] (1870) L.R. 5 C.P. 224.

[13] [1910] 1 K.B. 317.

[14] 4 Q.B.D. 104.

[15] 14 Ch.D. 785, 797.

[16] [1896] A.C. 434.

The main contention, however, is that, notwithstanding the provisions of section 1 of the Law of Property Act, 1925, under which a determinable fee cannot subsist as a legal estate, the determinable fee simple interest which was vested in a highway authority before 1926 is saved by section 7 (3). That subsection applies to statutory interests arising before 1926. Parliament has shown by section 7 that it did not intend the Law of Property Act, 1925, to interfere with statutory interests. If section 7 saves highways vested in a highway authority before 1926, it must also save highways which vest after 1925. For the purpose of subsection (1) of section 7 the Local Government Act, 1929, is a " similar statute " to the Lands Clauses Acts and the School Sites Acts. In subsection (3) (*c*) of section 7 " any other " statutes " includes statutes passed after the coming into operation of the Law of Property Act, 1925. Tithe redemption annuity is payable by the owner of the surface. The highway authority is the legal estate owner of the surface and so liable under the Tithe Act, 1936.

R. L. Stone (with him *J. B. Morcom*) for Imperial Chemical Industries Ld., supported the contention of the Tithe Redemption Commission. The difference between the Lands Clauses Acts and the Schools Sites Acts referred to in section 7 (1) is the method of divesting. In the former case, the divesting is in favour of adjoining owners, in the latter it is in favour of the grantor. In the case of highways the divesting is implied by the common law. In considering whether a statute should be considered as " similar " to those statutes, the only point of importance to be considered is that the legal estate is liable to be divested. The method of such divesting is not of importance.

Charles Russell Q.C. in reply. For the Tithe Redemption Commission to succeed they must show that the highway authority is a legal estate owner of the surface within the definition of "legal estate" in section 1 of the Law of Property Act, 1925. Subsection (1) of section 7 does not touch this case. That subsection is confined to statutes in existence at the commencement of the Act. Subsection (3) provides that the statutes there referred to "shall" remain in force. Those are anomalous statutes and do not include the Highway Acts. For subsection (1) to apply, the statute in question must itself provide for the divesting of the legal estate. The Lands Clauses Acts show what is meant. The divesting in the case of highways is not of this nature. It is necessary to find some statute providing for divesting. Parliament, in providing in the Local Government Act, 1929, that highways "shall vest," did not mean that a fee simple conditional should vest in the highway authority. The words "shall vest" in that Act, cannot have the same meaning as in the Acts passed before 1926, where a legal estate was not limited to a fee simple absolute in possession. It is not contended that the Settled Land Act, 1925, applies.

EVERSHED M.R. The short question in this appeal is whether the defendants, the Runcorn Urban District Council, are liable to the plaintiffs, the Tithe Redemption Commission, for an amount of tithe redemption annuity chargeable under the Tithe Act, 1936. The amount claimed is part of a larger annual sum, namely: that part (and the correctness of the apportionment is not in dispute) which is attributable to certain highways now included in a larger area within the district of the Runcorn Council. The larger area is, apart from the highways, admittedly in the exclusive ownership of the defendants, Imperial Chemical Industries Ld.

The relevant history of this area in Runcorn and the legislative history which preceded the passing of the Tithe Act, 1936, and the imposition of tithe rentcharge annuities for securing the compensation payment in extinguishment of the former tithe rentcharges, are not material to be set forth in this judgment.

We were informed that the present action was a test action to obtain the opinion of the court upon the question whether, having regard to the language of the Tithe Act, 1936, and in particular to section 17 thereof, a highway authority, in whom a highway has become vested by virtue of a statute, has an interest in land of the kind or quality sufficient to render it liable to a charge in respect of tithe redemption annuity.

The inquiry is limited to cases in which the right of the highway authority to the highway depends on the operation of one or other of the statutes vesting highways in local authorities, as distinct from cases where such vesting has been by way of a grant of the soil of the highway in an ordinary conveyancing sense.

In the present action the vesting of the relevant highways took effect pursuant to section 29 of the Local Government Act, 1929, an Act which was passed and came into operation after the coming into effect of the Law of Property Act, 1925, the Settled Land Act, 1925, and the other statutes compendiously referred to as the 1925 property legislation. It is this last-mentioned fact which, to my mind, gives rise to the real difficulty in the case.

It is conceded that the liability of the council depends on the answer to the question: are the council " owners " of the relevant highways within the meaning of section 17 of the Tithe Act, 1936? So far as is relevant, subsection (1) of that section provides: " the person who is to be deemed for the purposes of " this Act to be the owner of land shall be—(*a*) the estate owner " in respect of the fee simple thereof." Subsection (3) provides that " ' estate owner ' has the same meaning as in the Law of " Property Act, 1925." That definition necessarily introduces, by reference, the definitions in the Law of Property Act, 1925, section 205 (1) of which includes the following: in paragraph (v) " ' Estate owner ' means the owner of a legal estate," and in paragraph (x) " ' Legal estates ' mean the estates, interests and " charges, in or over land (subsisting or created at law) which " are by this Act authorized to subsist or to be created as legal " estates."

The result therefore (and so far there is no difference between Mr. Russell, on the one hand, and Mr. Cross, on the other) is that, if the plaintiffs are entitled to succeed, they must show that the council are, as regards the relevant highways, the owners of a legal estate in fee simple.

In order to answer that apparently simple question, it will be necessary for me to refer to other parts of the Law of Property Act, 1925, for, as is well known, since the passing of that Act, only certain kinds of interests in land are capable of subsisting as legal estates. But I must first ascertain what, by virtue of the relevant statute, has been " vested " (and I put that word in quotation marks) in the council in respect of these roads. That vesting took effect by virtue of section 29 of the Local Government Act, 1929, which, so far as is relevant, provides: " and all roads in relation to which they have " the functions previously mentioned, " and the materials thereof "and all drains belonging thereto shall vest in the" named council.

It is to be noted that the formula which I have quoted was incorporated by Parliament in the Act of 1929, passed after January 1, 1926, when Parliament must be taken to have been aware of the terms and effect of its previous enactments of 1925. The formula is not novel. The same formula is found in many previous statutes in pari materia, for example, the Public Health Act, 1875. Prima facie, therefore, Parliament in 1929, as regards the vesting of highways, must have intended the same effect as had been produced by the earlier and similar legislation. I have thought it desirable to state that apparently obvious fact, because one of the peculiarities of this case is that, on one view of the matter, the situation of highway authorities vis-à-vis tithe rentcharge annuities may, as a result of the property legislation of 1925, be different according as the vesting took place before or after January 1, 1926. If that view were right, the result would be no doubt surprising; but, if it is so, it has revealed a curious and no doubt unpremeditated by-product of the 1925 property legislation. In those circumstances it is desirable, in my judgment, first, to inquire what was the effect in law of the vesting by virtue of such a formula as is found in the Act of 1929 according to the old land law before the legislation of 1925.

It has been Mr. Russell's main argument that the effect was not to vest in or confer upon the highway authority a fee simple or legal estate in the highway of one of the kinds well recognized and understood by the old land law, but rather a special and peculiar species of proprietorship, having no doubt attributes common to the old estates in land, but not being in truth such an estate: conferring, that is to say, a special right to the surface and an undefined area below and above the surface, with all such ancillary rights and powers as were requisite for the authority in the performance of its statutory duties, but no more; in any event, not conferring an estate or interest in the land as known and understood to the general law. Support for this view was invoked particularly from the language of Farwell J. in *Hertfordshire County Council* v. *Lea Sand Ld.*[1]: "It is quite "unnecessary for me to refer in detail to any of the many "authorities which relate to this question, because it is now "clearly established, I think beyond all doubt, that a high-"road does vest in the road authority. It does not vest in fee

---

[1] (1933) 98 J.P. 109, 112; 32 L.G.R. 279.

C. A.
1954

TITHE REDEMPTION COMMISSION
v.
RUNCORN URBAN DISTRICT COUNCIL.

Evershed M.R.

"simple; that at any rate is plain. The right of the original owner "of the land remains untouched, and he remains the owner in fee "simple of the land, but subject to there being vested in the "road authority the actual road itself and so much of the soil as "is necessary to enable the road authority to perform its "statutory duties of repairing and maintaining the road as a "highway."

If this view is correct, then Mr. Russell advances, as the necessary consequence, the attractive conclusion that all the difficulties are circumvented. The highway authority is not and never was the owner of the legal estate for the purposes of the Tithe Act, 1936, or any analogous statute. In particular, its interest is altogether outside the scope and conveyancing purview of the property legislation of 1925.

I have been unable to accept this premise, notwithstanding the language I have quoted from Farwell J.'s judgment; for, in my opinion, we are bound by authority to hold that a vesting, according to a formula such as that of the Act of 1929, did operate to confer upon a highway authority in respect of some part of the land, which although indefinite in extent included the essential surface (that is, essential for the purpose of tithe, tithe rentcharges and the Tithe Redemption Act), a legal estate known to the law, namely, a fee simple determinable on the happening of a particular event—the event of the land in question ceasing to be used as a highway.

This, in my judgment, is the result of a number of cases, beginning (perhaps somewhat uncertainly) with *Coverdale* v. *Charlton*,[2] and ending with *Foley's Charity Trustees* v. *Dudley Corporation*.[3] I propose to refer to three of those cases, namely: *Rolls* v. *Vestry of St. George the Martyr, Southwark*,[4] *Mayor, etc., of Tunbridge Wells* v. *Baird*,[5] and *Foley's Charity Trustees* v. *Dudley Corporation*.[6] These cases, in my view, and particularly the last, constitute authority binding on this court that the highway authority acquired, by virtue of what I will call the statutory vesting of a highway in the form noticed, a legal estate, that is, a fee simple determinable.

In *Rolls* v. *Vestry of St. George the Martyr, Southwark*[7] the question arose because the highway in question having ceased to be used as such, the highway authority had claimed to be able to dispose of the area of the highway and to appropriate the proceeds to themselves under a section of the Public Health Act. That claim was resisted by the previous owner of the land or his successor in title. In the course of the judgments the following language was used. I will first read a somewhat substantial passage from James L.J.'s judgment, because it has been much relied upon in the course of the argument. He said[8]: "It appears to me that the legitimate construction of "the enactment that streets being highways shall vest is that "streets if and so long as they are highways shall be vested. "There are no words of inheritance, there are no words of "perpetuity in the Act, there is nothing to say whether the "streets are to vest in fee simple or for any limited estate, and "it appears to me that they are given to and vested in the "public body for the purposes of the Act and during the time "for which those purposes require them to be held, and no "longer. Words of divesting or defeasance are not required, "because to my mind the interest of the vestry is exactly like "a limited estate. If an estate is given to a woman during "her widowhood words of defeasance are not required to divest "it on her marriage, because the estate has ceased when the "original limit is arrived at. So in this case it appears to me "that when the thing has ceased to be a highway, when it has "ceased to be a street, then it ceases to be vested, because the "period for which it was to be vested in the board has come "to an end."

---

[2] (1878) 4 Q.B.D. 104.
[3] [1910] 1 K.B. 317.
[4] (1880) 14 Ch.D. 785.
[5] [1896] A.C. 434; 12 T.L.R. 372.
[6] [1910] 1 K.B. 317.
[7] 14 Ch.D. 785.

Cotton L.J. used somewhat similar language[9]: "The estate "or interest of the local board, whatever it was, was in that "case"—that is a reference to *Coverdale* v. *Charlton*[10]— "undoubtedly still continuing in them, and none of the judges, "so far as I can see, intended, and certainly I did not intend, to "decide what was the period for which this material thing was "vested in the local board. That is the question which we have "to decide in the present case, and I agree with the conclusion "at which James L.J. has arrived, that the estate and interest "of the vestry are limited by reference to the period for which "the street is used in a particular way, and that although there "is no divesting clause, yet the estate and interest of the vestry "cease when and if this (which I call a street) ceases to be used "as a highway."

The point to which those observations were particularly directed was this: that it was said on behalf of the vestry that the street having been vested in them, there was nothing to indicate in any statute, deed or otherwise, that it had ever been divested out of them. As the Lords Justices pointed out, that was unnecessary, because automatically the estate ceased to be in the authority when its purposes had become exhausted. But, in my judgment, there is no sufficient warrant for suggesting that, in the minds of James L.J. or Cotton L.J., the result was a kind of interest unknown to and not understood by the law. I think that the analogy which James L.J. gave of an interest given to a woman during her widowhood showed quite clearly that the result to his mind was an estate or interest in land perfectly intelligible in law.

---

[8] 14 Ch.D. 796.

[9] Ibid. 798.

[10] 4 Q.B.D. 104.

The next case is *Mayor, etc., of Tunbridge Wells* v. *Baird*,[11] which went to the House of Lords, and in which *Rolls* v. *Vestry of St. George the Martyr, Southwark* [12] was referred to. The headnote states: "where a local Act authorized the urban "authority to erect and maintain 'in any street or public place, "'or on land belonging to them or under their control,' lavatories "for the use of the public:—*Held*, that the urban authority "had no power to excavate the soil and erect lavatories below "the surface of a street which had vested in them within the "meaning of the Public Health Act, 1875." The point therefore really turned on the question whether the right of the local authority, the highway authority, extended to such an extent below the surface of the street as to enable them to make the lavatories in the sub-soil.

In the course of his speech Lord Halsbury L.C. used these words [13]: "My Lords, for my own part, I am disposed to adopt "every word of what James L.J. said in the passage that has "been quoted as to the true effect and meaning of the vesting "of a 'street' in a local body." That is a reference to the passage which I have already quoted from *Rolls* v. *Vestry of St. George the Martyr, Southwark*.[14] "That the street should be "vested in them as well as under their control, may be, I suppose, "explained by the idea that, as James L.J. points out, it was "necessary to give, in a certain sense, a right of property in "order to give efficient control over the street. It was thought "convenient, I presume, that there should be something more "than a mere easement conferred upon the local authority, so "that the complete vindication of the rights of the public should "be preserved by the local authority; and, therefore, there was

---

[11] [1896] A.C. 434.
[12] 14 Ch.D. 785.
[13] [1896] A.C. 434, 437.
[14] 14 Ch.D. 785.

"given to them an actual property in the street and in the "materials thereof. The same section that vests the street in "them vests also the materials, the actual personal property "provided for the purpose of repair, and so forth."

Lord Herschell said[15]: "My Lords, it seems to me that the "vesting of the street vests in the urban authority such property "and such property only as is necessary for the control, protec-"tion, and maintenance of the street as a highway for public "use."

It is true that Lord Macnaghten used rather more cautious language when he said in his short speech[16]: "I think the "meaning of section 149 of the Public Health Act, 1875, is to "give the urban sanitary authority the control and management "of streets coming within the description therein contained, and "such statutory right in the nature of a right of property as "may be sufficient to authorize them to sue and be sued as "occasion may require in the course of such control and "management."

Both Lord Halsbury L.C. and Lord Herschell to my mind indicated plainly their view that what passed to the highway authority was a right of property, and I think, particularly having regard to their reliance on the language of James L.J., that they meant a right of property known to and recognized and understood by the law.

The matter, however, so far as this court is concerned, seems to me to be made still clearer in the third of the cases which I have mentioned, *Foley's Charity Trustees* v. *Dudley Corporation.*[17] The question there concerned liability for payment of a certain rentcharge. The headnote reads: "For more than one "hundred years a fee farm rent had been paid to certain charity "trustees in respect of a piece of land acquired for the widening "of a turnpike road and since forming part of the road, but no "conveyance to the turnpike trustees was forthcoming. The rent-"charge was paid, first, by the turnpike trustees, who had "statutory power to buy land for widening the roads under their "control, and, on the expiration of the turnpike trust in 1871 "by virtue of the Annual Turnpike Acts Continuance Act, 1870, "by the defendant corporation, in whom as the highway authority "the road had become vested under the Public Health Act, 1848. "The corporation having refused to make any further payments,

---

[15] [1896] A.C. 434, 442.
[16] Ibid. 442.
[17] [1910] 1 K.B. 317.

"the charity trustees brought an action against them in the "county court for arrears of the rentcharge."

The precise point to which the argument was directed was whether the corporation, as highway authority, had, by virtue of the vesting in them of the highway under the Public Health Act, 1848, such an interest in the land as would make them terre tenants; but it is to my mind clear that, involved in it, was the question whether they had an estate in land known to and understood by the law.

I venture to read a part of the argument of Mr. Astbury, who appeared for the respondent plaintiff. He said [18]: "The appellants"—that is the Dudley Corporation—"are liable . . . for "this rentcharge. . . . The piece of land in question admittedly "forms part of the highway, which is vested in the appellants "by the Public Health Act. That vesting confers upon the "highway authority the possession and ownership of so much of "the soil as is required for the purposes of the highway. . . . The "interest which the appellants take is a statutory fee simple "interest determinable in an event which has not happened, "namely, on the road ceasing to be a highway." Then he cited *Rolls* v. *Vestry of St. George the Martyr, Southwark.*[19] "To the "extent of their interest their rights over the soil do not differ "from the rights of private owners." That was the argument which I think this court accepted.

Cozens-Hardy M.R. said [20]: "It is, to my mind, not open "to this court to question that road authorities in the position "of the defendants have a property in and possession of "the surface of the road, and of and in an undefined depth "below the surface, and have also a property in an undefined "section of the air above, so far in each case as is necessary for "the discharge of their duties. That has been decided, to "mention two only of the cases, by the Court of Appeal in "*Coverdale* v. *Charlton*,[21] and by the House of Lords in *Mayor*, "*etc., of Tunbridge Wells* v. *Baird*." [22] After referring to certain other authorities, he continued [23]: "In fact, as I think I put it, "it is a fallacy to say that a road authority, whose rights to the "soil are limited, are, to the extent of those rights, in a worse "position than a private owner, whose rights to the soil are "unlimited. What then is the position? I think that the true "position is this: that the road authority have what I may

---

[18] [1910] 1 K.B. 319.

[19] 14 Ch.D. 785.

[20] [1910] 1 K.B. 317, 322.

[21] 4 Q.B.D. 104.

[22] [1896] A.C. 434.

[23] [1910] 1 K.B. 317, 322.

"venture to call a determinable statutory fee simple interest in "such portion of the soil as is vested in them at all. . . . "They are liable because they are in possession of the land, "not in the full sense, no doubt, usque ad inferos, but they are "in possession, and they are in possession not as termor or bailiff, "but in a character which renders them liable to the rent-charge."

Fletcher Moulton and Farwell L.JJ. delivered judgments to the same effect. I quote one short passage from Farwell L.J.[24]: "I think that the estate of the authority may be defined "either as a statutory freehold or as a statutory fee simple "conditional. It is plain that it is statutory, and the somewhat "anomalous nature of the estate is immaterial because it is "created by Act of Parliament." At the conclusion of that paragraph, referring to another case, he said: "That appears "to me to shew that the true definition is either statutory fee "simple conditional or statutory freehold."

Mr. Russell has emphasized the use of the adjective "statutory": that, though the noun "freehold" is also used, it is so qualified by the word "statutory" as to mean something analogous to, but not the same as, an ordinary freehold estate known to the law. In the context, as I read it, it seems to me that that is not true. I think that the word "statutory" was used only to indicate that the estate, although a legal estate understood by the law, was the creature of statute, because it was conferred by statute and had, of course, this peculiarity, that the exact quantity or limits were undefined. I think, therefore, that these cases show that a highway authority, which had vested in it highways in that statutory form which I have already mentioned, acquired an estate known to the law, namely, a fee simple determinable. I refer to the passage in Challis on Real Property, 3rd ed., to which our attention was drawn, "Determin-"able Fees," Chapter 17, p. 251 and following.

It is true that in *Foley's* case[25] there were strong grounds, both in common sense and justice, for arriving at the conclusion which the court reached, but I think it clear that, if the Tithe Act, 1936 (with appropriate amendments to its definitions) had been enacted twenty years earlier, it would have been impossible to say, following *Foley's* case,[25] that a highway authority, in respect of highways acquired in the way I have mentioned, would not have been liable to the tithe redemption annuity.

What, then, was the effect of the property legislation of 1925?

---

[24] [1910] 1 K.B. 325.

[25] [1910] 1 K.B. 317.

C. A.
1954

Tithe Redemption Commission
v.
Runcorn Urban District Council.

Evershed M.R.

Before I read other relevant sections I observe that to my mind, where a highway authority took by virtue of some enactment prior to January 1, 1926, it would be impossible for them to escape the conclusion that, one way or another, they would have been estate owners within the meaning of section 17 of the Tithe Act, 1936. They would, indeed, have been, as I think, on the horns of a dilemma. Either the interest which they acquired would have been converted into an absolute legal estate in fee simple, being a legal estate authorized by the Law of Property Act, 1925, or their former determinable fee would have been converted into an equitable determinable fee simple, and in that event, by virtue of the transitional provisions of the Law of Property Act, 1925, the actual legal estate would have vested in the highway authority on trust for themselves to the extent of their equitable interest.

But in the present case the vesting did not occur until 1929, and the transitional provisions of the Act of 1925 are not therefore applicable. If the interest vested by the Act of 1929 is converted into an equitable interest, the land would appear to be settled land, for I do not for myself accept Mr. Megarry's submission that the land could not be said to be limited in trust. But it is not clear to me that any legal estate would now be vested in the highway authority, although the highway authority might have been able and might be able to require it to be so vested.

By section 1 of the Law of Property Act, 1925: "The only "estates in land which are capable of subsisting or of being "conveyed or created at law are—(*a*) An estate in fee simple "absolute in possession; (*b*) A term of years absolute. . . . (3) All "other estates, interests, and charges in or over land take effect "as equitable interests." If that section stood alone, it is plain that it would not apply to a fee simple interest determinable in the way I have mentioned: in other words, the interest of the highway authority is not, as I think, covered by section 1 (1).

Section 7 (1) is in these terms: "A fee simple which, by "virtue of the Lands Clauses Acts, the School Sites Acts, or any "similar statute, is liable to be divested, is for the purposes of "this Act, a fee simple absolute, and remains liable to be divested "as if this Act had not been passed." By subsection (3): "The "provisions of—(*a*) the Forfeiture Act, 1870, . . . (*b*) the "Friendly Societies Act, 1896, in regard to the land to which "that Act applies; (*c*) any other statutes conferring special "facilities or prescribing special modes (whether by way of "registered memorial or otherwise) for disposing of or acquiring "land, or providing for the vesting (by conveyance or otherwise) "of the land in trustees or any person, or the holder for the "time being of any office or any corporation sole or aggregate "(including the Crown); shall remain in full force. This sub-"section does not authorize an entailed interest to take effect "otherwise than as an equitable interest."

Danckwerts J. in the court below decided this case in favour of the plaintiffs, holding that the interest taken by the highway authority was comprehended by the provisions of section 7 (1). In this court subsection (3) has also been referred to, but I am not satisfied that subsection (3) applies, so to speak, prospectively; that is to say, I am not satisfied that the words "any other statutes" can mean and include statutes passed after the date of the Act of 1925. I need not discuss the other matters which were debated upon that paragraph. It seems to me that the use of the formula "shall remain in full force" makes it impossible to hold that the other statutes mentioned would comprehend, for example, the Local Government Act, 1929.

There remains, however, section 7 (1), and the real question and the only question here is whether the Local Government Act, 1929, is a "similar statute" within the meaning of the words I have used. Mr. Russell says that it is not and that the similarity required in the phrase "Lands Clauses Acts, the "School Sites Acts, or any similar statute" is of this nature: that it must be shown that the statute in question in terms effects a divesting upon the happening of some named event of land which, apart from that statutory provision, would remain absolutely vested.

In the present case, the point is made that there is not, and never was, any absolute out and out vesting of a fee simple: all that was passed or, apart from the Law of Property Act, 1925, would have passed, was an estate in land persisting only until the happening of the specified event, and then the automatic determination of that interest; there was, therefore, no absolute vesting and, consequently, no divesting. Mr. Russell refers particularly to the language that I have already read of James L.J.'s judgment in *Rolls* v. *Vestry of St. George the Martyr, Southwark*.[26] Alternatively, says Mr. Russell, if there is a divesting, it is not a divesting "by virtue of" the particular statute here in question; it is a divesting by the operation of the general law.

The distinction is on any view a narrow one. Take, for

---

[26] 14 Ch.D. 785, 796.

C. A.
1954

TITHE REDEMPTION COMMISSION v. RUNCORN URBAN DISTRICT COUNCIL.

Evershed M.R.

example, the School Sites Act, 1841, one of the Acts mentioned in terms in the subsection. By section 10 of that Act there is set out the form of grant appropriate to the purpose of the Act, and the material terms of the form of grant are these: that the land is conveyed to the particular body or authority "to hold unto and to the use of" the grantees "for the purposes "of the said Act, and to be applied as a site for a school for "poor persons of and in the Parish of (blank) and for the "residence of the schoolmaster (or schoolmistress) of the said "school (or for other purposes of the said school,) and for no "other purpose whatever."

Section 2, after empowering lands to be conveyed by a limited owner, ends with the following provision: "Provided also, that "upon the said land so granted as aforesaid . . . ceasing to be used "for the purposes in this Act mentioned, the same shall thereupon "immediately revert to and become a portion of the said estate "held in fee simple or otherwise . . . as fully to all intents and "purposes as if this Act had not been passed, anything herein "contained to the contrary notwithstanding."

In the Lands Clauses Consolidation Act the situation is somewhat similar, although, as Mr. Stone observed, on the happening of the event there relevant, the property would not revert, as in the School Sites Act, but would pass to the adjoining owners.

In this case, the estate passed to the highway authority for the purposes of use as a highway. It is not altogether easy to distinguish, as a matter of common sense, between that kind of case and the School Sites Act, 1841, where, according to the form of the grant, the grant is to the persons named as grantees for the purposes, and solely for the purposes, of use as a school. On the happening of the disabling event, in each case, the original owners or their successors are entitled to resume their proprietorship.

As a matter of common sense and ordinary language, to my mind, the result is really the same. So long as the land is used as a highway, it remains vested in the local authority. On the land ceasing to be a highway, the authority's interest is automatically "divested" in favour of the original owner or of his successors. The original owner could never, as I think, sensibly say, after the Act of 1929, that he took or had any reversionary interest or remainder; his only right was to have the land back on the happening of the event of the land ceasing to be used as a highway.

Although I confess to have found the matter difficult, I think, on the whole, that this statute is a "similar statute" within the meaning of section 7 (1) of the Law of Property Act, 1925; for I think that the genus or family of statutes there referred to is that of statutes providing for the acquisition of land, whether compulsorily or not, for use for public purposes or for the purposes of public undertakings, so that the right of property in the land acquired or vested subsists so long only as it is required for those purposes.

I therefore conclude that the case is covered by section 7 (1). That was the conclusion of Danckwerts J. I agree with his conclusion and I think that this appeal fails and should be dismissed.

DENNING L.J. Mr. Geoffrey Cross destroyed the arguments of Mr. Russell and Mr. Megarry in one sentence when he said that they had raised the dust and then claimed that we could not see through it. Our eyes, however, are not blinded by dust of that kind. The statute of 1929 vested in the local authority the top spit, or, perhaps, I should say, the top two spits, of the road for a legal estate in fee simple determinable in the event of its ceasing to be a public highway. This estate ranks as a fee simple absolute in possession, because the statute of 1929 comes within the category of "similar statutes" mentioned in section 7 (1) of the Act of 1925. This category comprises all statutes which vest property in a body for public purposes, with a proviso, express or implied, that their interest shall determine if the property should cease to be required for those purposes. The local authority is, therefore, the estate owner in respect of the fee simple, and is liable to pay the appropriate portion of the tithe redemption annuity. I agree that the appeal should be dismissed.

JENKINS L.J. I agree, for the reasons stated by my Lord, that this appeal fails and should be dismissed.

On the question whether the Local Government Act, 1929, section 29 of which contains the relevant vesting provisions, was quoad those provisions a "similar statute" as compared with the Lands Clauses Acts and the School Sites Acts mentioned by way of example in section 7 (1) of the Law of Property Act, 1925, and created a fee simple liable to be divested within the meaning of that subsection, I derive some assistance from this passage in the judgment of Fletcher Moulton L.J. in *Foley's*

C. A.
1954

TITHE REDEMPTION COMMISSION *v.* RUNCORN URBAN DISTRICT COUNCIL.

Jenkins L.J.

Charity Trustees v. *Dudley Corporation* [27]: " Therefore the defendants have this property in the land in question. It certainly " includes the surface, and it includes so much as is necessary to " support the surface as a road. For what period does this last? " It is a fee simple subject to this, that if the road should be " properly and legally abandoned and cease to be a highway, then " the freehold will revert to some other person."

Those words, in my view, are apt to describe a fee simple which is liable to be divested in the event to which they refer, and, inasmuch as I agree with my Lord that the relevant similarity for the purposes of section 7 (1) of the Act of 1925 is that the " similar statute " should be one under which, or pursuant to which, there is created a fee simple liable to be divested, and that the divesting should be liable to take place in the event of the property ceasing to be used for the purposes contemplated by the enactment, it is, in my judgment, right to hold that in this case section 29 of the Local Government Act, 1929, created a fee simple liable to be divested within the meaning of section 7 (1) of the Act of 1925 and was an enactment in the material respects similar to the two types of enactment mentioned in that subsection, namely, the Lands Clauses Acts and the School Sites Acts.

I agree that this appeal fails.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors: *Ponsford & Devenish for T. J. Lewis, Clerk to the Runcorn Urban District Council; Solicitor, Tithe Redemption Commission; J. W. Ridsdale.*

B. A. B.

---

[27] [1910] 1 K.B. 317, 324.

DEAN v. PRINCE AND OTHERS.

[1952 D. 253.]

C. A.

1954
Feb. 3, 4,
5, 8;
Mar. 8.

Evershed M.R.
Denning L.J.
and
Wynn-Parry J.

Company—Shares—Valuation—Shares in private company—Controlling interest—Valuation under article—Purchase by surviving directors—Break-up value of assets—Value as going concern—No expectation of profit-making.
Accountant or auditor—Certificate.

The valuation of a valuer can be impeached not only for fraud, but also for mistake or miscarriage: but on matters of opinion the court will not interfere.

Principles stated by Sir John Romilly M.R. in *Collier* v. *Mason* (1858) 25 Beav. 200 considered and applied.

The articles of association of a private company carrying on a light engineering business provided that a deceased director's shares should be purchased by the surviving directors at a price to be certified by an auditor as a fair value. A director who held a controlling interest in the company died. The auditor, having made a certified valuation, stated in writing that for the purpose of his valuation he had not regarded the company as a going concern but that he had valued on a "break-up" basis, because in his opinion the shares had no value on any other basis, having regard to the losses made by the company. On appeal from Harman J., who held that the valuation was invalid and not binding because the auditor had proceeded on the wrong basis and had not attributed any special value to the shares in question although they carried control of the company:—

Held, (1) that the auditor was right in not attributing a special value to these shares on account of their carrying control. The shares of the company should be valued as a whole and the total then divided rateably amongst all the shares equally;

(2) that the auditor had correctly rejected the "going-concern" basis of valuation, as the company had no expectation of profit-making.

Decision of Harman J. [1953] Ch. 590; [1953] 2 All E.R. 636 reversed on the question of valuation.

APPEAL from Harman J.

The plaintiff, Mrs. M. Lilian Dean, was the sole executrix of the will of her husband, who died on November 6, 1951. At his death Mr. Dean was the registered holder of a controlling interest in the capital of a private company, known as Dean & Mulhall Ld. Mr. Dean and the first and second defendants, Prince and Cowen, had formed the company together in 1938, and acting as working directors, all being stated to be "working "men," they had carried on a small light engineering business in Sheffield. During the war the company apparently enjoyed considerable prosperity, but subsequently it was far less prosperous and had only been kept going with the assistance of rebates on excess profits taxes and reserves against taxation. From 1945 to 1951, after deduction of remuneration for the working directors, the company had made an average yearly loss of £424. In 1951 Mr. Dean, who had been ill and unable to take an active part as a working director in the company for some time, died, and on his death there came into operation certain provisions in the articles of association of the company relating to the rights of the continuing directors to purchase the shares of a deceased member. In accordance with those provisions the auditors of the company, a firm of chartered accountants, W. G. Hawson, Wynn & Co., were required to certify the fair value of Mr. Dean's block of shares as at the date of his death. The valuation was made by Mr. Jenkinson of that firm, and he certified that each share was worth £7, the figure being subsequently increased to £8 for each share, to adjust an overstatement of indebtedness to Mrs. Dean. The valuation was communicated to Mrs. Dean, but she was extremely dissatisfied with it. In an attempt to reach agreement, Mr. Jenkinson wrote to her setting out the method which he had adopted in making the valuation, but no agreement was reached, and eventually Mrs. Dean brought proceedings against the other two directors and against the company, claiming that the valuation was misconceived, erroneous, and that it had been made on a wrong basis.

At the trial before Harman J. a preliminary point was taken on behalf of the defendants that the auditors' certificate was conclusive and binding on the plaintiff; and that as it was not wrong on the face of it, the court was not entitled to go behind the certificate and look at the reasons subsequently offered. Harman J. disallowed this objection because the auditor had stated his reasons, and no appeal was brought on this matter. On the main issue Harman J. held that the auditor had proceeded on a wrong basis, and, accordingly, that the valuation was invalid and not binding on the parties. The defendants appealed against that part of the judgment.

The facts and the evidence of the valuers are more fully set out in the judgments.

Strangman Q.C. and *D. S. Chetwood* for the defendants. The auditor did not disregard the fact that this company was a going concern, nor that the block of shares which he was valuing was a majority holding in that concern. He gave due weight to both factors, but came to the conclusion, having regard to the company's balance sheet over the relevant period (which showed that the company was, in substance, trading at a loss during that period, and that in December, 1951, when the valuation certificate was given the liquid asset position was unsatisfactory), that the shares would have had only a nominal value on the basis of a going concern. He therefore adopted the "asset content" basis as at an auction, and he obtained an independent valuation on that footing. That basis envisaged the break up of the company, and on that footing the purchasers would notionally, therefore, be losing their employment. The price which they were paying was high and the auditor was troubled lest he should have unduly favoured the vendor. He came to the conclusion, however, that the shares ought to be valued as on the open market in which these particular purchasers would be amongst the possible hypothetical purchasers. The auditor did not err in not making inquiries whether there existed a market for the company's concern in situ. The test is not what the assets might have fetched under any circumstances, but what a willing purchaser would have been likely to pay for these shares in the circumstances then prevailing: *Inland Revenue Commissioners* v. *Crossman.*[1] The auditor was of opinion that no buyer was likely to come forward to buy the whole concern, particularly having regard to the unattractive nature of the agreement under which the major part of the premises was held. The terms of that agreement made such a sale virtually impossible, for the company could only sell the whole concern if it went into liquidation, and by the terms of the agreement if the company went into liquidation, Mrs. Dean could exercise her power of re-entry. Consequently, a purchaser could not carry on the business in situ unless he was prepared to pay up to £5,000 under the agreement for premises which at the relevant time were worth much less.

Even if the block of shares was sold to one purchaser and the company had been considered as a going concern, the purchaser would have had only simple control, and he could not have overridden the rights of the minority shareholders. That hypothesis is not applicable here, for the articles provide that on a sale of shares, each of the continuing directors is to purchase equally. There would therefore be equality between the continuing directors.

---

[1] [1937] A.C. 26; 52 T.L.R. 415; [1936] 1 All E.R. 762.

The valuer said that he reached his conclusion on accountancy principles. He was right in applying accountancy principles. [Reference was made to Taxation (1953) No. 7, p. 124, which counsel adopted as part of his argument.] The auditor was not required to speculate, he was entitled to take the safe view and to conclude that a willing purchaser would not pay more than the break-up value even if he could have purchased all the shares. Applying accountancy principles, allowance would have to be made for "negative goodwill" because of the unfavourable trading position. For estate duty purposes valuations may be in excess of what a reasonable purchaser would pay, but that is not so here. [Reference was made to a memorandum submitted to the Board of Inland Revenue by the Institute of Chartered Accountants in July, 1953, entitled "Estate Duty "Anomalies," and to Dymond on Death Duties, 2nd ed., p. 239.] Even if the auditor erred in any particular, though this is not conceded, it cannot be said that, applying the test in *Collier* v. *Mason*,[2] he went wholly wrong on principle.

H. E. Francis for the plaintiff. The task of the auditor was to find the fair value of the shares. The wording of article 9 (g) does not preclude the court from intervening to consider the way in which the valuation was made, and if the court finds that there has been a mistake which makes the valuation unfair it can set aside the valuation. Any material mistake will justify the intervention of the court (see *Collier* v. *Mason* [2]), whether, e.g., a wrong method has been adopted in making the valuation, or whether the auditor has made some gross arithmetical error or omission. The question is not whether the auditor has specifically taken all relevant matters into consideration, but whether he has correctly appreciated and reflected the effect of all those matters in his valuation. It is submitted that he made a fundamental mistake when, in valuing on an asset content basis, he postulated (a) that the notional sale to realize the assets would be immediate or forced; and (b) that the best price for these assets would be obtained by selling them separately in an auction room as loose chattels, and that a purchaser would not pay more if he were buying the factory space and taking over the plant in situ. He assumed, without first getting a professional valuer's opinion, that the break-up value was the best obtainable, and that there was no other alternative which would have made a material difference. The hypothesis which he should have

---

[2] (1858) 25 Beav. 200, 204.

C. A.

1954

DEAN
v.
PRINCE.

visualized was that there might be a purchaser who wanted the premises with the machinery there, not to carry on the company's business but to carry on his own business. To such a purchaser the unsatisfactory trading position of the company would be irrelevant. It was said for the defendants that such a purchaser was unlikely in view of the terms of the agreement with Mrs. Dean which, the auditor said, had no value to the company. He was wrong in saying that, for the company had a recognisable beneficial interest in the part of the premises held under the terms of the agreement for the rest of the term held by Mrs. Dean. It was a defeasible interest, and the company had, of course, to pay the agreed payments and to perform the covenants, but from a practical point of view the company had a secure interest in the premises until the end of the term, and they could grant a sub-term to a purchaser of the plant who could then carry on in situ. Mrs. Dean could not in practice turn out that purchaser, provided, of course, that the covenants were observed. The evidence showed that there was a potential purchaser in the building where the company was carrying on business. A purchaser who wanted factory space with the plant in situ, by buying this block of shares would get control of the company, so that he could prevent the company from going into liquidation and so defeating his interest. That is why it is relevant to the valuation that this was a majority holding. The auditor valued these shares in the most disadvantageous way, and that vitiates his valuation. It is not axiomatic that, if the company could not be valued as a going concern, the only alternative was break-up value on a forced and immediate sale, and the auditor went wrong in applying what he called "accountancy "principles," for this was a matter of valuation which should have been made with regard to all the circumstances.

The company was not carrying on at a loss. The balance sheet figures are in a sense misleading, for the directors' fees were deducted, but these were working directors. The auditor ought to have considered the potentialities of this company. It had an established connexion, and in fact, after the certificate was given, obtained profitable contracts. There was here no urgency for a forced and immediate sale. [Reference was made to the observations of Lord Hanworth M.R. in *In re Sir William Thomas Paulin* [3] and to the observations of Swinfen Eady L.J. in *Inland Revenue Commissioners* v. *Clay*.[4]]

---

[3] [1935] 1 K.B. 26, 43.

[4] [1914] 3 K.B. 466, 475.

C. A.
1954

DEAN
v.
PRINCE.

Strangman Q.C. in reply. The authorities show that, in order to question a valuation such as this, it is necessary to establish that a fundamental mistake has been made as to the subject-matter valued: *Johnson* v. *Chestergate Hat Manufacturing Ld.*[5]; *Pappa* v. *Rose*[6]; *Diamantidi* v. *Grosvenor Securities Ld.*[7]; *Collier* v. *Mason.*[8] The plaintiff has failed to show that there is any fundamental principle which the auditor should have observed in making his valuation or, if there were any such principle, that it was not followed. He did not err in proceeding on accountancy principles, for it was implied that the valuation would be on that basis since an accountant was required to make it. There was ample material on which the auditor could reach the conclusion which he did. It has not been shown beyond any reasonable doubt that the auditor did not consider the hypothetical aspect of the matter, or that, if he had, it would have made any difference to the result.

Cur. adv. vult.

March 5, 1954. EVERSHED M.R. (reading his judgment). The relevant facts in this case are these: Three persons, all of whom were stated to be "working men" and all of whom (save as to the late Mr. Dean after his illness) were working directors, formed the defendant company shortly before the last war for the purpose of carrying on in Sheffield a light engineering business. The paid up capital of the company has consisted at all material times of 200 shares each of £1 and no more. Of these shares 140 were held by the late Mr. Dean, and 30 each by the two individual defendants, Prince and Cowen.

The business appears to have been highly successful during the war but more latterly it has been far less prosperous. Upon the true inference to be derived from the audited accounts of the company for the last six years up to May 31, 1951, there has been some argument. According to the appellants' counsel, the company was at the material date "trembling on the brink of "insolvency." The court found that, in each of the six years in question, the company made a trading profit in the sense that, after meeting or providing for all trade expenses and outgoings and for depreciation, but before payment of any directors' remuneration, there was a surplus of income over outgoings, averaging £1,300 per annum. The three directors were working directors in the true sense, that is to say, each of them in one capacity or another was working whole time in the business. Their remuneration, therefore (which Harman J. himself stated was modest) must fairly be regarded as part of the expenses of the business; and, after deducting the remuneration so paid to the directors for each of these years, there was an adverse balance on the profit and loss account in each year except one, which balance over the whole period amounted to over £2,500, or an average for each of the six years of £424. The company was able to sustain these losses and to continue in business as it did because, during the period in question, it obtained from the Inland Revenue repayment in respect of excess profits taxes amounting altogether to over £3,000. The state of the company's affairs, according to its balance sheet for the year ended May 31, 1951, stood thus: fixed assets, including plant and machinery, fixtures and fittings and motor vehicles, were represented by the sum of £4,070, being the original total cost less depreciation, the latter being arithmetically slightly less than 50 per cent. of the cost. Under the heading of "current assets" were stock in hand and work in progress —approximately £500. Sundry debtors and payments in advance were represented by £1,246, and cash at bank by £1,247. On the liabilities side of the balance sheet were trade creditors and accrued expenses, £1,591, which included a sum of £800 due to the plaintiff Mrs. Dean; and a further sum of £1,312 due to the late Mr. Dean on current account in respect (as we understood) of advances made at one time or another by Mr. Dean. Omitting the item of share capital and insignificant items on both sides of the balance sheet, the balance on the liabilities side was made up of approximately £4,000 standing to the credit of profit and loss account.

---

[5] [1915] 2 Ch. 338.

[6] (1871) L.R. 7 C.P. 32, 525.

[7] [1937] 1 All E.R. 703.

[8] 25 Beav. 200.

The late Mr. Dean died on November 6, 1951, and the provisions of the special articles relating to transfers of shares in such an event, accordingly, came into operation. The relevant article is article 9 of the special articles, which was applicable to all cases of transfer and transmission of shares. The particular paragraph applicable in the circumstances of the case is paragraph (g) which is in the following terms: "In the event of the death of any "member his shares shall be purchased and taken by the "directors at such price as is certified in writing by the auditor "to be in his opinion the fair value thereof at the date of death "and in so certifying the auditor shall be considered to act as "an expert and not as an arbitrator and accordingly the Arbitra-"tion Act, 1889, shall not apply. Unless they otherwise agree "the directors shall take such shares equally between them." As, in the course of the argument, reference was also made to paragraph (b) of the articles, it will be convenient also to set out the terms of that paragraph: "If any member desires to sell or "transfer his shares or any of them, he shall notify his desire to "the directors by sending them a notice in writing (hereinafter "called 'a transfer notice') to the effect that he desires to sell "or transfer such shares. The said transfer notice shall specify "the number of shares for sale or transfer, and the sum estimated "by the selling member to be the value of each of such shares. "The receipt by the directors of the said transfer notice shall "constitute an authority to them to offer the shares for sale at "a fair value ascertained as follows, viz.: The sum so estimated "by the selling member shall, if approved by the directors, be the "fair value, but in the absence of such approval in order to "prevent disputes arising, the fair value shall be the auditor's "valuation of the current worth of the company's shares to be "made by him in writing at the request of the directors."

The valuation which article 9 (g) required to be made was in due course undertaken by Mr. Jenkinson of the firm of W. G. Hawson, Wynn & Co., chartered accountants, the company's auditors. Some question was at one time raised of the exact circumstances in which Mr. Jenkinson made his valuation, but it is now agreed that Mr. Jenkinson, in making the valuation which he did, was duly carrying out the obligation indicated by article 9 (g) of the company's articles. Mr. Jenkinson, having completed his valuation, gave a certificate on December 6, 1951, to the effect that the shares of the late Mr. Dean were, in his opinion, of the value of £7 a share, or £980 altogether. Since the proceedings began it appears that the sum due to Mrs. Dean and referred to above was found to have been overstated by slightly less than £200, and it has been conceded on the part of the first two defendants that the valuation of the shares in question should, accordingly, be increased by £1 per share. Nothing, however, turns upon that matter; and it is also shown to be irrelevant, in my judgment, that shortly after the date of Mr. Jenkinson's certificate the affairs of the company took a considerable turn for the better. As appears from the cited paragraph of the article, Mr. Jenkinson was required to value the shares as at the date of Mr. Dean's death, namely, November 6, 1951, and, at any rate for the purposes of this appeal, it has been accepted that Mr. Jenkinson was justified in concluding, as he did, when he came to make his certificate, that there was no reason to expect any such

C. A.
1954

DEAN
v.
PRINCE.

Evershed M.R.

change for the better in the affairs of the company—indeed, his inquiries had led him to suppose that, on the contrary, matters had rather tended to worsen since May, 1951.

Mrs. Dean was dissatisfied with Mr. Jenkinson's valuation, and she, accordingly, brought the present action, in which she has sought a declaration that she is not bound to transfer the shares at the valuation arrived at by Mr. Jenkinson. Having regard to the form of the article it is not in doubt that, were it not for one circumstance, Mrs. Dean could not have questioned the validity and conclusiveness of Mr. Jenkinson's certificate, since no sort of imputation has been made, or could be made, of Mr. Jenkinson's integrity. That one circumstance is this: Mr. Jenkinson had (in the laudable hope of achieving agreement between Mrs. Dean and the first two defendants) indicated in writing the method which he had adopted in arriving at his valuation, as follows: "3. In "view of these trading results—and taking into account to some "extent the difficult position in which the company would be "placed if the amounts due to Mr. and Mrs. Dean had to be paid, "it was clear that no value could be put on the shares on a normal "going concern basis other than something purely nominal. It "became necessary, therefore, to consider the only other basis "which could apply, i.e., break-up value. 7. The foregoing "showed that to a third party the shares were unlikely to be "worth more than £1,400 and that it was by no means certain "that that amount could be realized. To the parties who are "under obligation to buy the shares it left out of account "altogether one important factor, viz., that they could realize "the break-up value only at the expense of losing their employment. To retain their employment, i.e., considering the transaction on a going concern basis, they would be paying £7 for "shares on which we could place no value. In view of this "position it could be regarded as a matter of grave doubt whether "a valuation of £7 a share did not substantially favour the "seller."

At the trial before Harman J. a preliminary point was taken on the part of the defendants that the valuation was unchallengeable in the courts, since the shareholders had by the articles submitted the matter in question to the exclusive arbitrament of the auditor. Harman J. disallowed this objection on the ground that, by stating the reasons which had led him to arrive at his valuation, Mr. Jenkinson had exposed his certificate to examination by the courts into the validity of such reasons. There has been no appeal to this court from that part of the judgment of Harman J.

Harman J. then proceeded to consider the basis of Mr. Jenkinson's valuation, and concluded in favour of the plaintiff that Mr. Jenkinson had fallen into error on a matter of principle, or had made a material mistake in arriving at his figure; and so he declared that the plaintiff was not bound by the certificate. It is against this part of his judgment that the defendants have appealed.

Having regard to the defendants' acceptance of Harman J.'s decision on the preliminary point, it is not, in my judgment, open to them now to say that, whatever was the reasoning upon which it was based, Mr. Jenkinson's valuation is unchallengeable in the courts. The only question for us is whether, in regard to the process, as it was stated in writing to Mrs. Dean by Mr. Jenkinson and expanded by him in evidence, whereby he arrived at his valuation, that valuation is liable to be impeached. Counsel before us were both content to accept as the correct test to be applied the language of Sir John Romilly M.R. in *Collier* v. *Mason*[1]: "This court, upon the principle laid down by Lord "Eldon, must act on *the* valuation, unless there be proof of some "mistake, or some improper motive, I do not say a fraudulent "one; as if the valuer had valued something not included, or had "valued it on a wholly erroneous principle . . . or even, in the "absence of any proof of any one of these things, if the price were "so excessive or so small as only to be explainable by reference to "some such cause; in any one of these cases the court would "refuse to act on the valuation." In the case cited the Master of the Rolls was of opinion that the valuation was perhaps exorbitant but "I cannot say it amounts to evidence of fraud, "mistake or miscarriage."

There was some discussion before us of the proper meaning to be attached to the words "mistake," "wholly erroneous prin- "ciple" and "miscarriage," as used by Sir John Romilly M.R. I shall not attempt any exhaustive exposition of that language or of the circumstances in which, in such a case as the present, the court should hold a party not bound by a valuation. For my part I think that the plaintiff is prima facie entitled to succeed if she is able to show that Mr. Jenkinson, in arriving at his figure of £7 per share, made a mistake of a substantial character or materially misdirected himself in the course of his valuation. Mr. Strangman contended that the mistake must be a mistake related to the entire subject-matter of the valuation. I cannot agree.

[1] (1858) 25 Beav. 200, 204.

It seems to me that the most obvious case of mistake, one indeed indicated by Sir John Romilly himself, would be if the valuer omitted altogether to take account of some substantial asset or made a serious arithmetical miscalculation in regard to a single but material part of the whole process. In the present case Harman J. was of opinion that Mr. Jenkinson erred in making his valuation on the basis that the only method of valuation appropriate in the circumstances was that of a break-up or forced sale of all the company's assets. In my judgment if Harman J. was right in this conclusion then I think that the plaintiff would have established a mistake or miscarriage within the language used by Sir John Romilly and would prima facie be entitled to the declaration which she obtained.

Let me say again that there is no question whatever of the integrity or impartiality of Mr. Jenkinson, nor, I think, of his professional skill as an accountant. The possibility of occasional error is common to all men, to whatever profession they may belong. I have intimated already that the basis adopted by Mr. Jenkinson for his valuation was, in my judgment, clearly that of a break-up or forced sale of all the company's assets as upon a liquidation brought about by insolvency. It is also plain that he took no account of the circumstance that the number of shares in question constituted a majority holding of the company—a matter which strongly impressed the mind of Harman J. In regard to the latter point it is, however, to be noted that the number of shares in question, (140) being less than three-fourths of the whole, did not carry an absolute control over the affairs of the company: and I say at once that if the valuation was rightly made on the basis I have just mentioned, then I should not myself quarrel with the view that the figure eventually arrived at, as representing the value of all the assets and the liabilities, should then be apportioned rateably among all the shares in disregard of any majority holding. A valuation of shares in a company such as the one in question in circumstances such as the present is plainly a matter of difficulty and one upon which opinions may fairly differ. I apprehend, however, that it was the intention of the article that the auditor should arrive at a view of what the shares in question were really worth having regard to all relevant circumstances. I think, accordingly, that for this purpose there is no distinction to be found between paragraphs (b) and (g) of the articles above quoted. On the other hand, I do not think that there is applicable any rule of thumb or accountancy principle which fixes or

C. A.
1954
Dean
v.
Prince.
Evershed M.R.

limits the possible bases of calculation to be adopted. It was suggested in argument for the appellants that there was some analogy to a valuation for estate duty purposes. But if it be a fact that, for convenience or otherwise, certain fixed alternative principles are commonly adopted for estate duty purposes, then it does not seem to me that the analogy is conclusive, for we are not here concerned with any estate duty valuation.

In the case of a private company carrying on a profitable business it is no doubt true that a sound and obvious basis of calculation would be in accordance with the expectation of profit for the future, particularly where the shares in question would constitute a majority holding. In my judgment, however, Mr. Jenkinson rightly rejected any such basis of valuation in the present case; for a continued expectation of loss would produce necessarily a negative result; and I have already said that the change of fortune which occurred after Mr. Jenkinson's valuation is, in my judgment, irrelevant. A calculation on the basis of profits (that is upon the basis of expected returns on the footing of the company continuing as a going concern) being out of the way, Mr. Jenkinson, as I think, turned clearly to a break-up value as upon a forced sale as the only available alternative. It was suggested in argument that although the phrase "break-up" was frequently used, Mr. Jenkinson was in truth proceeding upon what was called the "asset content" of the shares or the undertaking. If, however, it was thereby suggested that Mr. Jenkinson proceeded otherwise than upon the hypothesis of a forced sale and of a break-up of the company's undertaking and assets accordingly, I am, for my part, unable to agree. Since this point underlay the substance of much of the argument before us, I venture to quote at length certain passages from Mr. Jenkinson's evidence. In examination in chief it was said: "(Mr. "Chetwood): So perhaps we need not consider what method of "approach you would have considered if you had come to the "conclusion that this company had a profit earning capacity, at "least not in detail. Now, having got to that conclusion, what "was your next step? (A) I then had to consider whether there "was any other realizable value in the shares by considering what "else the holders of those shares could do, and I came to the "conclusion that there was one other way in which an amount "could be realized on these shares, and that was to sell the assets "individually, and to work out what value would thereby be "produced. I therefore arranged for a valuation of the plant "and machinery. (Q) On what basis was that valuation?

"(A) On a basis of what the items concerned would fetch in an "auction. I then substituted that figure of that valuation for "the book figures of those same assets, and I made a small "deduction from the sundry debtors. The actual deduction was "10 per cent. of the book value for the costs of realizing them. "(Harman J.): I do not quite understand the deductions you "made. (A) If it is necessary, my Lord, to realize all the debts "of the company at one moment there is always some deficiency, "and a reasonable measure of that deficiency was taken to be "10 per cent. Doubtful debts was what I was referring to there. "(Q) Anything else? (A) I found an item of work in progress in "the 1951 balance sheet of £400, which related almost entirely to "one partly-finished machine, and I was advised by the directors "that there was very little likelihood of ever selling that machine, "and that its scrap value, as it would probably have to be scrapped, "was £50. I therefore reduced the figure of work in progress for "this purpose from £400 to £60. With those exceptions, no "alterations were made to the figure on the balance sheet in May, "1951. (Mr. Chetwood): Pausing there, these deductions which "you have made, as I understand it, were made for the purpose "of arriving at the value for break-up purposes? (A) That is "right. (Q) Would that be the reason why no such deductions "were made in the balance sheet? (A) Certainly. (Q) Then, "the next step was what? I am afraid I interrupted you. "(A) The result of those adjustments was to produce a figure "of £1,400, which I found was the break-up worth of this "company. With due respect, my Lord, I shall have to repeat "that, as I found that that was greater than any value which "could be arrived at on a going-concern basis, I considered that "that was a price, £7 per share, to which any seller was entitled "or which any buyer would be ready to pay since that amount "could at any time be realized. It was, therefore, in my opinion, "the maximum price and also the minimum price for the purpose "of my valuation."

In cross-examination he gave the following answers: "(Harman J.): What did you do in particular with regard to this "company? Whom did you consult of the company's officials? "(A) The company's officials had been consulted at the time of "the May, 1951, balance sheet, and chiefly in that case it would "be, I think, Mr. Cowen, although I am not sure about that, "to see what debts were considered good or bad, but the main "purpose of this deduction of 10 per cent. was that, since we had "decided that this was a valuation on a break-up basis, it is a

" well-known fact that you cannot hope to recover 100 per cent. " of your debts and that some reasonable deduction is necessary. " So, to that extent, my answer is that it is in the nature of the " general practice to make some deduction. If there was a " liquidation, for instance—we have not used that word yet, but if " there was a liquidation—you would be very fortunate, I think, " if you got 100 per cent. of the debts which appeared in any " balance sheet." In answer to another question he said: " I do " not think I can quite agree with that, because, as I explained, " we are now considering break-up, which is a different matter " from allowing one's debtors to have sometimes extended periods " of credit. It is a different thing in saying that you think that " in the long run you will receive all your debts in full from " saying that you can within the course of a week or two realize " them in full. (Harman J.): Why was there this urgency? I " cannot understand that. Why within a week or two? (A) " Because that, my Lord, as I have explained, was the basis on " which we decided we should value." Again: " (Q) I was " suggesting to you that, if the balance sheet as at May 31, 1951, " gives a true and fair view of the state of the company's affairs " at that time, it is nonsense to say that the real value of the " assets was £1,400. That, in effect, was what you said, was it " not? (A) Yes. I am saying that the value of the shares was " £7 a share, which I agree is the same thing as saying that the " value of the net assets is £1,400 on a break-up basis. I must " add that, ' on a break-up basis.' "

And finally: " (Mr. Francis): On that point, which is an " important point, you did not consider, did you, whether the " factory with the plant in situ could be disposed of to anybody? " You assumed that that was quite impossible, did you not? " (A) I assumed that it would be unlikely that you would find a " willing buyer at more than the price I put on it to take over " this factory and the plant as it was, as it stood, with a view " to carrying it on. The reason I came to that conclusion was " because the evidence was all to the effect that unless he, the " buyer, was going to put into it something which it had not " got already—and that was no concern of mine—what he was " buying would only continue to lose money for him and, there" fore, a willing buyer of the whole thing was in my mind " regarded as unlikely at a figure above my valuation, £1,400. " (Harman J.): You did not ask for it to be valued on the basis " that there might be a buyer, did you? (A) No. (Q) Did you " ask the valuer whether he could find a buyer, or whether he "thought there might be a buyer? You see, you are not a valuer "yourself? (A) I did not ask any particular valuer that question, "no. (Q) I do not expect that aspect of the matter ever entered "your head? (A) I certainly considered the possibility, but I "considered it most unlikely that anybody would want to take "it over. (Q) Were you qualified to have an opinion on that "subject, being a chartered accountant and not a valuer? (A) "Yes, I think so, because I came to that conclusion on "accountancy principles. (Mr. Francis): In other words, you "assumed that if any buyer should come forward to buy the "factory with the plant and machinery in situ there he would "not pay any more than £1,400? (A) Yes. My job was to value "shares, and that was the value. (Q) I know your job was to "value shares, but I want to put that question again. You came "to the conclusion that if any buyer did come forward and take "the factory and the plant and machinery there in situ he would "not pay more than £1,400? (A) That is right. Not just for "the plant, but for the whole thing."

From the passages which I have quoted I draw the following inferences: (1) The effect of a valuation on the basis selected was plainly to depress greatly the value of the assets. It was made clear by Colonel Riddle, a valuer acting for Mr. Jenkinson, in the written valuation supplied by him to Mr. Jenkinson, and equally in his evidence in court, that his figure for the plant, furniture, machinery and so forth, namely, £1,785 10s. 0d., was arrived at on the basis of their auction value, that is on being broken up and removed from the factory and in part, at any rate, sold for scrap. Colonel Riddle made it clear that he was not asked to consider any other basis, and further he said in evidence that a valuation "in situ" would have been higher. In this connexion, although I do not suggest that the balance sheet figure of over £4,000 for the same items could or should be taken as the value of these assets for present purposes, it must be remembered that, having regard to the small number of shares, an increase of even 10 per cent. on the figure of £1,785 would mean an extra 17s. 6d. per share. (2) (And as a corollary to the above) Mr. Jenkinson ignored the possibility of a gradual turning to account and disposal of the company's assets. (3) He ignored also in the same connexion the circumstances that a majority holding, even though not a three-fourths majority, would enable a buyer to control the method and speed of disposal. It is in this respect that to my mind the fact that the shares in question constituted a majority holding was relevant. I can well understand that a notional buyer of 30 of the shares in the company would find the proposed sale highly unattractive since, once in the company, he would be unable to get out and could not control in any way the conduct of the company's business. Finally: (4) Mr. Jenkinson justified the basis selected by him "on accountancy principles."

There is one very special and material circumstance about this company and its business to which I have not so far alluded, to which I shall presently return, and which, as will appear, seriously qualifies the conclusion at which I should otherwise arrive. But apart from that circumstance, I should for myself have agreed with Harman J. in holding that Mr. Jenkinson made a material mistake or erred in principle in valuing the shares on the basis of the break-up value, that is, on the basis of a forced sale of the company's assets; and further in regarding himself as, in effect, compelled to that conclusion by "accountancy principles." The question for Mr. Jenkinson was—what in truth were these 140 shares worth? In other words, if Prince and Cowen paid £X for the shares, would they get that much value for their money? I prefer so to formulate the question, for there were here, for the purposes of the valuation, not only a willing seller and a willing buyer, but one who was bound to sell and two who were bound to buy at Mr. Jenkinson's price.

In my judgment the relevant question cannot fairly be answered by a mere application of accountancy principles, by a mere arithmetical process. The question has to be answered in light of the general conditions affecting the light engineering business in Sheffield and all circumstances peculiar to the defendant company. As regards the former matter the evidence was, clearly, that the prospects of such businesses were generally, at the relevant time, good. As regards the latter matter it was, in my view, of great significance that of the company's four-storey factory premises, one floor was occupied by one Goodyear as tenant or licensee of the defendant company, and he was and is in the same line of business and said in evidence that he was and is interested in the company's plant, etc., and the company's business in the event of a sale. Mr. Jenkinson did not, as is quite plain, make any inquiry of this Goodyear or of anyone else because he was not concerned to consider, as material to the "asset content" of the company, the possibility of a sale of any of the assets "in situ"; although, as I have already said, the value on such basis would have been higher (see Colonel Riddle's evidence), and even a 10 per cent. increase in the value of the fixed assets would have added another 17s. 6d.

to the figure for Mr. Dean's shares. In my judgment Mr. Jenkinson erred in neglecting these considerations. It was said by Mr. Strangman that he did not neglect them; rather that he considered them all carefully, but formed the opinion that in all the circumstances they did not serve to add anything to the break-up value. If this was so, then I should agree with Mr. Strangman that if Mr. Jenkinson erred, he committed no more than an error of judgment, which would not avail Mrs. Dean. But I have not been able to accept Mr. Strangman's premise. The passage in the evidence which I last quoted and which was the passage relied on for this purpose by Mr. Strangman, does not in my judgment support his contention. In my view all the general and particular considerations which I have mentioned were excluded by Mr. Jenkinson from his purview, and were deliberately so excluded as irrelevant, since "on accountancy principles" a break-up valuation was alone, in his view, admissible.

In the result, therefore, Mrs. Dean would in my judgment prima facie be entitled to the relief she claimed, and if the matter ended there I should for myself agree with Harman J. in his conclusion. But there remains the special circumstance which I have mentioned above. We were informed that some part, unspecified but I suppose small, of the company's property was held by it on the terms of a monthly tenancy. But the greater part (or so I assume) of the company's business premises was the subject of an agreement dated November 27, 1950, an agreement of a most unusual and, from the company's point of view as things have turned out, a most unattractive character. By this agreement Mrs. Dean contracted to sell and the company contracted to buy for the sum of £5,000 the premises in question, which appear to have been vested in Mrs. Dean for a term of 800 years from March 25, 1837, at a ground rent of £10 10s. 0d. per annum. The company thereupon became entitled in equity to the long term of years. It was, however, provided that the purchase price should be payable by yearly instalments of not less than £200 in any one year. At the material date one only of such instalments had been paid; and on the evidence it is at least doubtful if the premises are worth as much as the unpaid balance of the purchase money. It is, however, further provided (by clause 8) that if the company should "suffer any process of "execution or distraint . . . or be wound up either compulsorily "or voluntarily, or fail to observe any of the covenants" earlier mentioned "or fail in any one year to pay to the vendor a "minimum of £200 on account of the purchase money, the

C. A.
1954

DEAN
v.
PRINCE.

Evershed M.R.

" vendor may give 3 months' notice in writing to the purchaser " . . . and if before the expiration of the notice the purchaser " shall not comply with " the requirement in the notice (which the company would not appear to be able to do in the case of a winding up) the vendor is entitled to terminate the contract and re-enter and re-sell the premises. Finally, by the succeeding clauses, the company is prohibited from assigning or charging the benefit of the contract without the vendor's written consent.

It is unfortunate that the nature and effect of this contract were little referred to or considered at the trial. As a practical matter the company might well, no doubt, be able to grant licences to others to occupy all or part of the factory, and such persons might then be willing to pay the company a price for the plant " in situ." But the tenure of such persons of the premises would appear to me to be of a somewhat precarious nature, unless arrangements were made for the completion of the purchase, or at least for payment of a substantial part of the outstanding purchase price—considerations obviously highly significant to a sale of the company's plant " in situ " which was the only alternative basis suggested by Mr. Francis. In the event of a winding up the company might, moreover, be in some difficulty in removing certain of the plant for any purpose.

I have had the advantage of reading in advance the judgments prepared by my two brethren who are of opinion that the appeal should be allowed—in the case of Wynn-Parry J. " with some " reluctance." I share Wynn-Jarry J.'s reluctance, for I cannot help feeling that the amended price of £8 per share was, and is, appreciably less than the true worth of the shares. I repeat again the fact that an increase of £200 in the valuation of the assets represents an addition of £1 per share to the valuation. But having regard to the clear opinion of my brethren, and bearing in mind that in this as in other actions the plaintiff must make a good case, I have felt compelled to the conclusion that although, as I think, Mr. Jenkinson erred in principle in treating himself as bound on accountancy principles to regard only the break-up value, Mrs. Dean has nevertheless failed sufficiently to establish that a consideration of the values of the plant " in situ " or otherwise would produce, in all the circumstances, a figure of value materially different from that at which Mr. Jenkinson arrived.

DENNING L.J. The task of the auditor here was to act as an expert and not as an arbitrator; and, as an expert, he was to certify what, in his opinion, was the fair value of the shares.

The draftsman of the article obviously was aware that there is a special virtue in an expert's valuation. The reason is because it is so much a matter of opinion that it is very difficult to say it was wrong. But difficult as it is, nevertheless if the courts are satisfied that the valuation was made under a mistake, they will hold it not to be binding on the parties.

In considering this matter we ought, I think, to put on one side the cases about the personal liability of a valuer. They show that he is not liable to an action unless he is dishonest, see *Pappa* v. *Rose*,[2] and *Finnegan* v. *Allen*.[3] But those cases have no application when we are considering the validity of the valuation itself. It can be impeached not only for fraud but also for mistake or miscarriage. That was made clear by Sir John Romilly M.R. in *Collier* v. *Mason*.[4] For instance, if the expert added up his figures wrongly; or took something into account which he ought not to have taken into account, or conversely: or interpreted the agreement wrongly: or proceeded on some erroneous principle. In all these cases the court will interfere. Even if the court cannot point to the actual error, nevertheless, if the figure itself is so extravagantly large or so inadequately small that the only conclusion is that he must have gone wrong somewhere, then the court will interfere in much the same way as the Court of Appeal will interfere with an award of damages if it is a wholly erroneous estimate. These cases about valuers bear some analogy with the cases on domestic tribunals, except of course that there need not be a hearing. On matters of opinion, the courts will not interfere; but for mistake of jurisdiction or of principle, and for mistake of law, including interpretation of documents, and for miscarriage of justice, the courts will interfere: see *Lee* v. *Showmen's Guild of Great Britain*.[5]

In this case Harman J. has upset the valuation on the ground that the auditor failed to take into account some factors and proceeded on wrong principles. I will take the points in order:

1. *The right to control the company.* Harman J. said that the auditor should have taken into account the fact that the 140 shares were a majority holding and would give a purchaser the right to control the company. I do not think that the auditor was bound to take that factor into account. Test it this way: suppose it had been Prince who had died, leaving only 30 shares. Those 30 shares, being a minority holding, would fetch

---

[2] (1871) L.R. 7 C.P. 32.

[3] [1943] K.B. 425; [1943] 1 All E.R. 493.

[4] 25 Beav. 200, 204.

[5] [1952] 2 Q.B. 329; [1952] 1 T.L.R. 1115; [1952] 1 All E.R. 1175.

nothing in the open market. But does that mean that the other directors would be entitled to take his shares for nothing? Surely not. No matter which director it was who happened to die, his widow should be entitled to the same price per share, irrespective of whether her husband's holding was large or small. It seems to me that the fair thing to do would be to take the whole 200 shares of the company and see what they were worth, and then pay the widow a sum appropriate to her husband's holding. At any rate if the auditor was of opinion that that was a fair method, no one can say that he was wrong. The right way to see what the whole 200 shares were worth, would be to see what the business itself was worth: and that is what the auditor proceeded to do.

2. *Valuation of the business "as a going concern."* Harman J. seems to have thought that the auditor should have valued the business as a going concern. I do not think that the auditor was bound to do any such thing. The business was a losing concern which had no goodwill: and it is fairly obvious that, as soon as Mrs. Dean had sold the 140 shares to the other two directors—as she was bound to do—she would in all probability call in the moneys owing to herself and to her husband amounting to over £2,000. The judge said that she was not likely to press for the moneys because that would be "killing the goose that "laid the eggs," but he was wrong about this; because as soon as she sold the shares, she would have got rid of the goose and there was no reason why she should not press for the moneys. She was an executrix and the company's position was none too good. It had only £1,200 in the bank to meet a demand for £2,200. In these circumstances the auditor was of opinion that there was a strong probability of the company having to be wound up: and he rejected the going-concern basis. For myself, I should have thought he was clearly right, but at any rate no one can say that his opinion was wrong.

(3) *Valuation of the assets of the business.* Once the going-concern basis is rejected, the only possible way of valuing the business is to find out the value of the tangible assets. Harman J. thought that the assets should have been valued as a whole in situ. It was quite likely, he said, that "some one could have "been found who would make a bid for the whole thing, lock, "stock and barrel." But the judge seems to have forgotten that no one would buy the assets in situ in this way unless he could also buy the premises; and the company had no saleable interest in the premises. In respect of part of the premises the company

had only a monthly tenancy: in respect of the rest the company had only a contract for the purchase of the premises on paying £200 a year for 25 years. It had no right to assign this contract; and its interest was liable to be forfeited if it went into liquidation, either compulsory or voluntary; and the probability was, of course, that, if it sold all the assets, it would go into liquidation, and hence lose the premises. The company could, therefore, only sell the assets without the premises. That is how the auditor valued them and no one can say that he was wrong in so doing.

(4) *Valuation on a "break-up" basis.* The auditor instructed the valuer, Colonel Riddle, to value the plant and machinery at the break-up value as loose chattels on a sale by auction. Harman J. thought that that was a wrong basis because it was equivalent to a forced sale. I would have agreed with the judge if the business had been a profitable concern. The value of the tangible assets would then have been somewhere in the region of £4,000 or £5,000, being either the balance sheet figure of £4,070 or Pressley's figure of £4,835. But the business was not a profitable concern. It was a losing concern: and it is a well-known fact that a losing concern cannot realize the book value of its assets. There is an element to be taken into account which is sometimes spoken of as "negative goodwill." It comes about in this way: if a business is making a loss, that shows that its assets, regarded as an entity, are not a good investment. A purchaser will decline, therefore, to buy on that basis. He will only buy on a piece-meal basis, according to what the various assets taken individually are worth: and it is obvious that on a sale of assets piece-meal, the vendor will suffer heavy losses as compared with the book figures. The auditor was therefore quite justified in asking the valuer to value the assets as loose chattels sold at an auction. At any rate, if he honestly formed that opinion, no one can say that he was wrong.

5. *The special purchaser.* Harman J. thought that someone could have been found to buy the 140 shares who would use his majority holding to turn out the two directors, and reorganize the factory and put in his own business. In other words, that the shares would have a special attraction for some person (namely, the next-door neighbour) who wanted to put his own business into these premises. I am prepared to concede that the shares might realize an enhanced value on that account: but I do not think that it would be a fair price to ask the directors to pay. They were buying these shares—under a compulsory sale and purchase—on the assumption that they would continue in the business as

working directors. It would be unfair to make them pay a price based on the assumption that they would be turned out. If the auditor never took that possibility into account, he cannot be blamed; for he was only asked to certify the fair value of the shares. The only fair value would be to take a hypothetical purchaser who was prepared to carry on the business if it was worth while so tô do, or otherwise to put it into liquidation. At any rate if that was the auditor's opinion, no one can say that he was wrong.

I have covered, I think, all the grounds on which Harman J. upset the valuation. I do not think they were good grounds. I would, therefore, allow the appeal and uphold the valuation.

WYNN-PARRY J. (read by EVERSHED M.R.). I accept that the principles which this court should apply in a case such as this are those laid down by Sir John Romilly M.R. in *Collier* v. *Mason*.[6] Two points appear to me to call for consideration. The first is the point taken by Harman J. that the auditor was dealing in this case with a block of shares, which constituted a controlling interest, and that he failed to take this circumstance into consideration.

It appeared to be accepted on behalf of both parties that it was necessary to postulate a sale between a notional willing seller and a notional willing buyer in a supposed free market. No doubt in the case of valuations of shares in private companies for estate duty purposes where, either because of the restrictions on transfer in the articles of association, or for other reasons, no free market exists, certain assumptions having no basis in reality must be made; but in a case such as this, where an auditor, acting as an expert, is directed to value shares for a particular purpose, namely, in order to give effect to the articles of association of a private company upon the death of a member in order to regulate the rights between the estate of that deceased member and the surviving members, he is bound to have regard to the realities of the situation as it exists, and not to make more artificial assumptions than are necessary.

By article 9 (b), which regulates transfers among members inter vivos, it is provided that in default of approval by the directors of the sum estimated by the transferring member to be the value of the shares to be transferred " the fair value shall be " the auditor's valuation of the current worth of the company's " shares." That language appears to me to preclude the auditor from placing any extra value on a block of shares because it constitutes, or will in the hands of the particular transferee constitute, a controlling interest. Article 9 (g) provides that "in the "event of the death of a member his shares shall be purchased "and taken by the directors at such price as is certified in writing "by the auditor to be in his opinion the fair value thereof at the "date of death." In my view as a matter of construction the same basis of valuation should be applied under this paragraph as under paragraph (b), and therefore no extra value should be placed on the shares because they may constitute a controlling interest.

---

[6] 25 Beav. 200, 204.

But further, as the auditor, in my view, has to have regard to the realities of the situation, he must take into account that the other directors, and not merely one of them, are bound to purchase the shares in question. It is true that the other directors are entitled to decide between themselves how they will take up the shares, but, as I see it, they need not arrive at this decision until after the auditor's valuation has been received. It follows from this that the auditor cannot assume that the shares will remain as a block and be transferred to one director. Indeed, the reverse is the probability: for if the shares are not an attractive proposition, it is unlikely that one director will assume a greater liability than he need; whereas if they should be an attractive proposition it is unlikely that his fellow director will allow one director to acquire a controlling interest. In my judgment, therefore, with all respect, Harman J. was wrong in approaching this case as one in which the sale of a controlling interest was involved.

The second point, which is the substance of the argument of Mr. Francis, is whether or not the auditor should have obtained a valuation of the plant and machinery in situ, on the basis that a purchaser could be reasonably envisaged who would take over either the premises and the plant and machinery in situ or the shares of the company with a view in either case to carrying on, not the business of the company but a business of his own, for the carrying on of which the plant and machinery would be suitable.

It was urged on us by Mr. Strangman, for the appellants, that the auditor did take this very matter into consideration, and having done so concluded that it was unnecessary to obtain such a valuation. On this point the relevant evidence is to be found in the note of the evidence. "(Mr. Francis): On that point, "which is an important point, you did not consider, did you, "whether the factory with the plant in situ could be disposed of "to anybody? You assumed that that was quite impossible, did "you not? (A) I assumed that it would be unlikely that you "would find a willing buyer at more than the price I put on it "to take over this factory and the plant as it was, as it stood, "with a view to carrying it on. The reason I came to that conclusion was because the evidence was all to the effect that "unless he, the buyer, was going to put into it something which "it had not got already—and that was no concern of mine—what "he was buying would only continue to lose money for him and, "therefore, a willing buyer of the whole thing was in my mind "regarded as unlikely at a figure above my valuation, £1,400." Now it is clear that up to that point the witness was proceeding on the basis that the buyer would not wish to carry on the business, and was contemplating a buyer who would purchase the factory and premises in order to carry on a different business. The evidence proceeds as follows: "(Harman J.): You did not "ask for it to be valued on the basis that there might be a buyer, "did you? (A) No. (Q) Did you ask the valuer whether he "could find a buyer, or whether he thought there might be a "buyer. You see, you are not a valuer yourself? (A) I did not "ask any particular valuer that question, no. (Q) I do not "expect that aspect of the matter ever entered your head? "(A) I certainly considered the possibility, but I considered it "most unlikely that anybody would want to take it over. "(Q) Were you qualified to have an opinion on that subject, "being a chartered accountant and not a valuer? (A) Yes, I think "so, because I came to that conclusion on accountancy principles." Now when the witness says: "I certainly considered "the possibility, but I considered it most unlikely that anybody "would want to take it over," he must mean by "it" the whole undertaking of the company, and not merely the factory, plant and machinery. The evidence, however, goes on: "(Mr. "Francis): In other words, you assumed that if any buyer should "come forward to buy the factory with the plant and machinery "in situ there he would not pay any more than £1,400? (A) Yes. "My job was to value shares, and that was the value. (Q) I know "your job was to value shares, but I want to put that question "again. You came to the conclusion that if any buyer did come "forward and take the factory and the plant and machinery there "in situ he would not pay more than £1,400? (A) That is "right. Not just for the plant, but for the whole thing." Now those two answers show to my mind that the auditor was still thinking of the whole undertaking of the company, and was not envisaging a purchaser who desired to buy the shares in order to carry on a different business on the premises. I conclude, therefore, that he never had that consideration in mind.

The question, however, remains, should he have had this consideration in mind? In the course of his argument, Mr. Francis first proceeded on the basis of envisaging a purchaser who would take over, not the shares, but the factory and the plant and machinery with a view to carrying on in the factory a business of his own: but in view of the very unusual terms of the agreement of November 27, 1950, under which the company held the premises, he was constrained to rest his case on the basis of a buyer who would purchase the shares, and then, through the medium of the existing company, carry on his existing or proposed business. I am bound to say that such a proposition, namely, the purchase of the shares of a private company in order to carry on a different business on its premises with its plant, made necessary because of the very unusual provisions on which it holds its premises, is such an unusual proposition that I cannot conclude that in not taking it into consideration the auditor was making such a substantial mistake or proceeding on such an erroneous principle as to entitle the court to interfere: and in coming to this conclusion I do not forget that there was a tenant, Goodyear, who, according to his evidence, would have been willing to take over the rest of the premises. The evidence, however, does not show that he was conversant with the provisions on which the company held the premises.

I would, therefore, though with some reluctance, allow the appeal.

Appeal allowed. Respondent to pay costs in the Court of Appeal and four-fifths of the costs in the court below. Leave to appeal to the House of Lords refused.

Solicitors: *Allen & Overy; J. R. Pullon, Walters & Co. for Elliott & Slater, Sheffield.*

E. D.

1953
Oct. 14;
Nov. 12.

Vaisey J.

C. A.

1954
Feb. 17, 18;
Mar. 5.

Evershed M.R.,
Denning and
Jenkins L.JJ.

In re GREAVES. PUBLIC TRUSTEE *v.* ASH.

[1953 G. 1013.]

Power of Appointment—Fraud on power—Revocation of appointment—Release—Scheme reducing estate duty—Benefit to appointor and potential appointees—Whether fraud on power—Whether doctrine applies to revocation of appointment.
Revenue—Tax avoidance scheme.

A testator, who died in 1934, directed that (after the death of his wife) the whole of the income of a trust fund should be held on trust for his daughter for life, and he conferred on her a power of appointment among her children or remoter issue in such manner as she should by deed revocable or irrevocable or by will or codicil appoint. On May 30, 1938, the daughter executed a deed of appointment (reserving therein a right to revoke the appointment). In or about 1950, after the death of the testator's wife, a scheme was suggested to the daughter, and to her adult daughters, for a partial distribution of the capital of the trust fund. In order to carry out the scheme, she executed in February, 1952, a deed of revocation of the appointment of May 30, 1938, and a deed releasing her power of appointment among issue. The scheme, which depended on the deed of revocation, would have had the effect of placing her in possession of large capital funds.

The Public Trustee, as trustee of the will, took out a summons to ascertain (1) whether the exercise of a power of revocation was within the doctrine of a fraud on the power; and (2) whether, in the circumstances, the particular revocation of the power of appointment was or was not a fraud on the power:—

Held, that on the facts of this case the revocation of the power of appointment was not within the doctrine of a fraud on the power. The fiduciary duty attached to the exercise of the power of appointment was owed to the persons who would have taken in default of appointment, but that duty did not apply to a revocation, for a revocation could not injure them and the potential appointees could not complain if the appointor chose to exercise his right to revoke the appointment he had made, for it was expressly made revocable.

In re Jones' Settlement [1915] 1 Ch. 373 overruled.

Shirley v. *Fisher* (1882) 47 L.T. 109 considered.

Per curiam: There might be cases where a power to revoke previously declared trusts is so closely related to a power of re-appointment that the validity of the revocation would be dependent on the validity of the re-appointment.

Decision of Vaisey J. reversed.

ADJOURNED SUMMONS.

The following statement of facts is taken substantially from the judgment of Vaisey J. adopted by the Court of Appeal:—
Henry Greaves, the testator, made his will on November 19,

1931. He appointed the Public Trustee to be the trustee and executor and constituted a capital fund of residue which he defined as "the trust fund." He directed that one half of the income of the trust fund should be paid to his wife (who died in 1944) during her life and, subject thereto, that the whole of the income of the trust fund should be held on trust for his daughter, the defendant Mrs. Ash, during her life. Subject to those interests, he directed that his trustee should stand possessed of the trust fund and the income thereof in trust for all or such one or more of the others or other of the children or remoter issue of Mrs. Ash at such time and if more than one in such shares and with such provisions for maintenance, advancement and otherwise at the discretion of any persons and generally in such manner for the benefit of such children or issue or some or one of them as Mrs. Ash should by deed revocable or irrevocable or by will or codicil appoint, with an ultimate trust in default of and subject to any such appointment for all or any of the children or child of Mrs. Ash who being male attained the age of 21 years or being female attained that age or married under that age and if more than one in equal shares, subject to the usual hotchpot provision.

The testator died on December 6, 1934. His estate was sworn at a sum of upwards of £420,000. Mrs. Ash was born on January 30, 1897. She married once only, and of that marriage there were issue five daughters, of whom the eldest was married and had a child, and the youngest was an infant.

On May 30, 1938, Mrs. Ash executed a deed of appointment whereby she (inter alia) directed the trustee of the will to divide the trust fund into as many shares as there should be children of hers living at her death who being sons should have attained the age of 21 years or being daughters should have attained that age or have married or should marry under that age, and as there should be children of hers who should have predeceased her leaving children living at her death, and that each share should be held on the trusts following, that is to say: (a) on trust to hold the income of each share in the trust fund attributable to children who should not have predeceased her on protective trusts for the benefit of the child during his or her life; (b) subject thereto upon trust to hold the capital and income of the share of each child of Mrs. Ash living on the date of the death of the testator for all or any of the children and child of such child who being male should attain the age of 21 years or being female should attain that age or marry, in equal shares if more than one; and (c) subject as aforesaid on trust to hold the capital and income of each share of every other child of Mrs. Ash for all and any of the children and child of such child born in Mrs. Ash's lifetime and who being male should attain the age of 21 years or being female should attain that age or marry, and for all and any of the children and child of such child as should be born after Mrs. Ash's death and who, whether males or females, should be living at, or being females should marry before, the expiration of 20 years from Mrs. Ash's death if more than one in equal shares. Further, by the said deed of appointment, Mrs. Ash also purported to make certain modifications in the protective trusts contained in the statute in that behalf. She also reserved to herself power at any time or times thereafter by any deed or by will or codicil wholly or partially to revoke the appointment thereinbefore contained. Mrs. Ash never exercised her power of appointment among issue save by the appointment of May 30, 1938.

Subject, therefore, to the power of revocation reserved in the appointment of May 30, 1938, the infant granddaughter of Mrs. Ash became, by virtue of that appointment, entitled to an expectant share in the capital of the testator's trust fund.

On February 15, 1952, Mrs. Ash by deed of that date wholly revoked and made void her appointment of 1938, to the intent that the trust funds thereby appointed should be held upon the trusts applicable thereto as if the appointment of 1938 had not been executed. On the following day, February 16, 1952, by a further deed Mrs. Ash released and for ever discharged the trust funds in question from the power of appointment given to her by the testator's will to the intent that such power should "not "henceforth be exercisable by her and the said trust funds . . . "devolve according to the provisions in the . . . will . . . contained "in default of appointment." On February 18, 1952, Mrs. Ash entered into four further documents expressed to be conditional agreements for exchange with her four adult daughters. These last-mentioned agreements, and the preceding deeds of revocation and release, were all executed as part of a scheme, the nature and purpose of which, as stated on behalf of the plaintiff, the Public Trustee, in an affidavit filed in support of the originating summons, was as follows:—"In the year 1951 the plaintiff was "informed by Mrs. Ash's solicitors . . . that a scheme had been "suggested for a partial distribution of the capital of the trust "fund between Mrs. Ash and her adult daughters; particulars of "the scheme were as follows: (a) that Mrs. Ash should revoke "the said appointment; (b) that she should release her said

" power of appointment among issue over the trust fund; (c) that " the plaintiff should divide the trust fund into five equal shares " and appropriate one of such shares to each of Mrs. Ash's five " children; (d) that in the case of each of Mrs. Ash's adult children the share of the trust fund appropriated to the child in " question should be divided between Mrs. Ash and the child " actuarially according to the respective values of their interests " therein Mrs. Ash releasing her life interest in the part to be " taken by the child and the child by way of exchange assigning " her reversionary interest to Mrs. Ash in the part to be taken " by Mrs. Ash; (e) that in the carrying out of the said scheme " Mrs. Ash on the one hand and her adult children on the other " hand should be separately represented both by solicitors and " actuaries and that due regard should be had to any estate duty " payable in respect of the trust fund on the death of Mrs. Ash " for which the plaintiff should be liable."

The Public Trustee took out a summons to determine (1) whether the exercise of a power of revocation was within the doctrine of a fraud on the power, and (2) whether (if the doctrine applied), in the circumstances, this particular revocation of the power of appointment was or was not a fraud on the power.

The summons was heard by Vaisey J.

Cur. adv. vult.

Nov. 12, 1953. VAISEY J. This case raises the question whether the doctrine of frauds on powers applies to an exercise of a power of revocation contained in a revocable appointment. If that question is answered in the affirmative, there is the further question whether the revocation of an appointment in the present case, made in the circumstances hereinafter mentioned, was or was not fraudulent. [His Lordship stated the facts as above set out and continued:] The present proceedings were brought by the Public Trustee as plaintiff against Mrs. Ash, her five daughters and the infant daughter of Mrs. Woods as defendants, owing to the doubt as to the proper answers to the questions stated in the opening words of this judgment.

Having decided to carry the scheme into effect, if possible, Mrs. Ash and her adult children have respectively entered into the following documents: (a) Mrs. Ash on February 15, 1952, executed a deed whereby she revoked the appointment of May 30, 1938, and on February 16, 1952—that is, the next day—she executed a further deed releasing the trust fund from the power of appointment conferred on her by the testator's will, to the intent that the trust fund should devolve according to the provisions contained in the will of the testator in default of appointment by her; and (b) on February 18, 1952, she entered into four conditional agreements for exchange (one with each of her four adult daughters), such agreements being agreements to exchange interests as proposed by the scheme as before-mentioned, but all were conditional on the outcome of the present proceedings and have in fact been superseded by further conditional agreements dated May 15, 1953, to which I will presently refer.

Subsequently to February, 1952, it was agreed that the scheme should not include those parts of the trust fund which consisted of rentcharges or freehold lands, nor certain investments representing capital moneys arising from the sale of certain lands. The balance of the trust fund has been divided into five equal shares and the division is accepted by the Public Trustee for the purposes of the appropriations under the scheme. In the substituted conditional agreements for exchange the respective one-fifth shares of the balance of the trust fund appropriated to the adult daughters respectively are dealt with as follows: In the second schedule thereto in each case is set out the particulars of the share of the property appropriated to the daughter in question, and in each case Mrs. Ash and the child in question agreed for the exchange of Mrs. Ash's interest in the investments in part 2 of such second schedule for the interest of the child in the investments in part 1 of that schedule, such agreement being in each case conditional on the validity of the said deed of revocation being established in these proceedings. In the event of the deed of revocation being held to be invalid, questions will arise as to the extent to which the trusts declared by the said appointment intended to take effect after the death of Mrs. Ash are, if unrevoked, effective. I will refer to this later on.

Now, of course, it cannot be disputed that the result of the scheme which derives from and depends on the deed of revocation is to place Mrs. Ash in possession of large capital funds; nor, I think, can it be doubted that the scheme is at least as much for the benefit of Mrs. Ash as for the benefit of her daughters. The first question, therefore, is whether the deed of revocation is of such a nature as to be liable to be invalidated under the doctrine of fraud, as that word is used in this connexion. It is surprising that the authorities are so few and not altogether satisfactory.

1953

GREAVES, *In re.* PUBLIC TRUSTEE *v.* ASH.

Vaisey J.

In *Shirley* v. *Fisher*,[1] it would seem that Bacon V.-C. said that such a deed was not so liable. On the other hand, Astbury J., in *In re Jones' Settlement*,[2] came quite definitely to the opposite conclusion and explained *Shirley* v. *Fisher*[1] as being a case in which there was no evidence of fraud so that the Vice-Chancellor's pronouncements on the general proposition were no more than obiter. The headnote in that case includes the following statement: "Although the doctrine of fraud on a power does "not apply to the release of a limited power, *In re Somes*,[3] it "applies to the revocation of an appointment thereunder. The "donee cannot therefore revoke a previous appointment with the "avowed object of obtaining a benefit by that revocation"; and the judgment concludes with the following statement[4]: "In the "present case, although there is no evidence of fraud in the "ordinary sense, I still have to determine whether it is not what "is called a fraud on the power for the wife to execute her "fiduciary power of revocation with the avowed object of getting "£890 for herself, she being neither an object of the power, nor "entitled in default of appointment. There can only be one "answer to that question."

Now, in view of the plain words of Astbury J., to which I have just referred, I think that I ought not to attempt to re-open the general question of whether a power of revocation can be fraudulently exercised, and I propose to follow him and to say that it can. It is undoubtedly somewhat anomalous that the release of a power is not subject to the provisions as to fraud, while the revocation of an appointment is so subject; but the whole doctrine is somewhat technical in its application. In Farwell on Powers, 3rd ed., at p. 497, this sentence occurs: "It must be borne in mind that, although the doctrine of frauds "on powers does not apply to a release of a power, it does apply "to a power of revocation"; and then *In re Jones*[5] is cited. Remembering that Mrs. Ash is endeavouring by the scheme to put herself in possession of a very large capital fund in exchange for her life interest, I turn to the classic pronouncements of the highest authorities, as, for example, *Portland* v. *Topham*,[6] in which Lord Westbury said: "the settled principles of the law "upon this subject must be upheld, namely, that the donee, the "appointor under the power, shall, at the time of the exercise of "that power, and for any purpose for which it is used, act with

---

[1] (1882) 47 L.T. 109.
[2] [1915] 1 Ch. 373.
[3] [1896] 1 Ch. 250; 12 T.L.R. 152.
[4] [1915] 1 Ch. 373, 381.
[5] [1915] 1 Ch. 373.
[6] (1864) 11 H.L.C. 32, 54.

"good faith and sincerity, and with an entire and single view to "the real purpose and object of the power, and not for the "purpose of accomplishing or carrying into effect any bye or "sinister object (I mean sinister in the sense of its being beyond "the purpose and intent of the power) which he may desire to "effect in the exercise of the power"; and in the same leading case, Lord St. Leonards observed[7]: "A party having a power "like this must fairly and honestly execute it without having "any ulterior object to be accomplished. He cannot carry into "execution any indirect object, or acquire any benefit for himself, "directly or indirectly. It may be subject to limitations and "directions, but it must be a pure, straightforward, honest "dedication of the property, as property, to the person to whom "he affects, or attempts, to give it in that character." See also *Vatcher* v. *Paull*,[8] in which appear the well-known words of Lord Parker of Waddington, who defines a fraudulent appointment as one which "has been exercised for a purpose, or with an intention, "beyond the scope of or not justified by the instrument creating "the power." He also observed that it was enough to vitiate an appointment if the appointor's purpose and intention was to secure a benefit for himself or for some other person not an object of the power, and that in such a case the appointment is invalid unless the court can clearly distinguish between the quantum of the benefit intended to be conferred on the appointee and the quantum of the benefit intended to be derived by the appointor. See also *In re Crawshay*.[9]

I do not think that this case can be brought within the principle of *In re Huish's Charity*,[10] nor *In re Merton*,[11] in which a transaction not altogether dissimilar from the present was carried out. There, however, the appointment and the scheme were not part of the same transaction, but were, as Wynn-Parry J. found, separate and distinct. The truth is that the scheme in the present case may well be regarded as a meritorious one, but the very fact that it is beneficial to all parties, non-objects as well as objects and including Mrs. Ash herself, makes it impossible for me to say that it complies with the requirements laid down by Lord Westbury and Lord St. Leonards in *Portland* v. *Topham*,[12] and the many other cases which illustrate the same principle.

---

[7] 11 H.L.C. 55.

[8] [1915] A.C. 372, 378.

[9] [1948] 1 Ch. 123, 135; 64 T.L.R. 67; [1948] 1 All E.R. 107.

[10] (1870) L.R. 10 Eq. 5.

[11] [1953] 1 W.L.R. 1096; sub nom. *In re Merton's Settlement* [1953] 2 All E.R. 707.

[12] 11 H.L.C. 32.

The scheme may be very good indeed, and there may be many ways in which to carry it out, but, in my judgment, it cannot be validly effected in any manner which gives to the appointor, Mrs. Ash, many thousands of pounds of capital through and by means of her execution of a fiduciary power.

That gives rise to the alternative question, namely, the validity of the appointment of May 30, 1938, which I suppose involves the consideration of the question whether Mrs. Ash was entitled to incorporate in it protective trusts for the benefit of her children respectively. Two points appear to emerge; one is as to the validity of the delegation involved in a protective trust and whether such delegation is permissible, having regard to the words in the testator's will; the other point is as to what are the effects of the modifications sought to be made by Mrs. Ash in the protective trusts to which I have already alluded. These are designed to exclude non-objects of the power from being objects of the discretionary trust and to preclude any forfeiture being incurred under the protective trusts by reason of any consent by a child of Mrs. Ash to the exercise by the trustee of the testator's will and the trustees of a settlement therein mentioned, as to which it has not been necessary for me to say anything, of a power of advancement in favour of such child. I think that this question should be further argued, but if my decision on the first point is appealed from, such further consideration had better stand over until the appeal has been disposed of.

There will be a declaration that in the circumstances in which the above-mentioned deed of revocation of February 15, 1952, was executed, the appointment of May 30, 1938, was not effectively revoked by that deed of revocation.

Declaration accordingly.

J. L. D.

Mrs. Margaret Ash appealed.

L. M. Jopling for Mrs. Margaret Ash. A power of revocation is not subject to the doctrine of fraud on a power, for, strictly speaking, it is not a power at all: Farwell on Powers, p. 1. An appointment is a fraud on the power if it is an appointment to persons who are outside the limited class of appointees: see *Portland* v. *Topham* [1] and *Vatcher* v. *Paull.* [2] The reservation of a power of revocation is deliberately given to the donee of the power so that he can change his mind. A power of appointment presupposes objects, but a power of revocation has no objects. The appointees under the power of appointment cannot, obviously, be the objects of the power of revocation. A person who makes an appointment under a revocable power of appointment and then revokes is in exactly the same position as if he had made no appointment. A power of appointment is only fiduciary in so far as it is limited, and a power of revocation cannot be more fiduciary than the power of appointment itself. There is no fiduciary obligation on the donee of a revocable appointment to leave the appointment unrevoked, and in exercising the power the donee owes no duty to anyone. A power of release, as in *In re Somes*,[3] is, therefore, analogous to a power of revocation.

---

[1] (1864) 11 H.L.C. 32.

[2] [1915] A.C. 372, 379.

The exercise of a power of revocation, however exercised, cannot be a fraud on the power, for it can never be foreign to the purpose for which the power was created. In *Shirley* v. *Fisher*[4] Bacon V.-C. said in effect that the doctrine of a fraud on the power does not apply to a power of revocation which the appointor has reserved to himself. *In re Jones' Settlement*[5] went the other way, but it is submitted that it should not be followed. The fact that a power of appointment cannot be delegated has no connexion with the nature of a power of revocation. Farwell on Powers, at pp. 466 and 467, merely follows the headnote in *In re Jones' Settlement*.[5] The doctrine of a fraud on the power is technical and should not be extended. It is undesirable to hold that a power of revocation is within the doctrine for it may be in the interests of all to be able to alter an appointment.

[EVERSHED M.R. There can be no objects of a power of revocation considered in isolation, but the position may be different if the revocation is ancillary to a re-appointment.]

A re-appointment would, of course, be within the doctrine, but the revocation in the present case was followed by a release of the power, and a release is not within the doctrine.

[Counsel then considered whether the particular revocation was or was not a fraud on the power, assuming that the exercise of a power of revocation would be within the doctrine of a fraud on a power, and submitted that it was not.]

W. S. Wigglesworth for the Public Trustee.

W. F. Waite for the other respondent. The question is whether the fiduciary duty which exists with the power of appointment continues if the power is revoked. *Shirley* v. *Fisher*[6] is not a satisfactory case, for it is not clear what was really decided, except that it seems that on the facts there was no fraud on the power. At the end of his judgment Bacon V.-C. apparently said that the power of revocation was given to the appointor by himself and not by the settlor, but that clearly seems to be wrong. And Astbury J. in *In re Jones' Settlement*[7] had no difficulty in finding that the same duty attached to both an appointment and to a revocation of a revocable appointment.

---

[3] [1896] 1 Ch. 250; 12 T.L.R. 152.

[4] (1882) 47 L.T. 109.

[5] [1915] 1 Ch. 373.

[EVERSHED M.R. What is the result if a revocation is followed by a re-appointment which is a fraud on the power?]

Even if the revocation was bona fide, it might be so bound up with the subsequent invalid re-appointment that it would fail and the original appointment would stand, but in some cases the revocation might be distinct from the re-appointment, and then, provided that it did not itself constitute a fraud on the power, it would be effective, so that the persons entitled in default of appointment would take if the subsequent re-appointment failed. When exercising a power of revocation the appointor must not be actuated by any motive which is not bona fide from the point of view of the power given to him. He has no right to revoke simply in order to allow the funds to go in default of appointment for his own purposes. *In re Somes*[8] was concerned with a special power of appointment, and there was nothing anomalous in holding that a release of that power was not subject to the doctrine of a fraud on the power. The donee of a revocable power of appointment can release the power and escape the fiduciary duty altogether, but if he undertakes the duty by making an appointment he cannot lightly afterwards discard it, but he is subject to the control of the Chancery courts in the way he revokes the appointment.

[EVERSHED M.R. In exercising the power of revocation, to whom does he owe this fiduciary duty?]

He owes a duty both to the class of objects of the revocable appointment and also to the persons entitled in default.

[EVERSHED M.R. But the persons entitled in default could not be injured by a revocation of the appointment.]

Jopling replied.

Cur. adv. vult.

---

[6] 47 L.T. 109.

[7] [1915] 1 Ch. 373.

[8] [1896] 1 Ch. 250.

March 5. EVERSHED M.R., reading the judgment of the court, stated the facts substantially as set out above and continued: In these circumstances the question has arisen whether the transaction described in Mr. Higson's affidavit can be impeached as involving a "fraud on a power"—in particular, a fraud on the power of revocation expressly conferred by the testator and expressly reserved by Mrs. Ash in the deed of 1938. Two separate points are involved, namely, (1) whether the principles enshrined in the formula "a fraud on a power" apply at all to the power of revocation conferred, reserved, and exercised, in the present case, and (2), if so, whether on the facts of the present case there has been such a fraud.

Vaisey J. answered both inquiries affirmatively. As regards the second, he said[1]: "The truth is that the scheme in the "present case may well be regarded as a meritorious one, but the "very fact that it is beneficial to all parties, non-objects as well "as objects and including Mrs. Ash herself, makes it impossible "for me to say that it complies with the requirements laid down "by Lord Westbury and Lord St. Leonards in *Portland* v. *Topham*,[2] and the many other cases which illustrate the same "principle. The scheme may be very good indeed, and there "may be many ways in which to carry it out, but, in my judgment, it cannot be validly effected in any manner which gives "to the appointor, Mrs. Ash, many thousands of pounds of "capital through and by means of her execution of a fiduciary "power." Assuming that the principles of a fraud on a power apply at all, we should entirely agree with Vaisey J. upon this second point and, in light of the terms of the affidavit filed on behalf of the plaintiff, we cannot usefully add anything to the language of the judge save to observe the not insignificant point that Mrs. Ash has been the sole appellant before us and through Mr. Jopling has most strenuously argued in favour of a reversal of Vaisey J.'s judgment upon both the points formulated above.

Vaisey J. drew attention to the extreme paucity of authority upon the first point. The matter seems twice only to have been before the court, at first instance—in *Shirley* v. *Fisher*[3] before Bacon V.-C., and in *In re Jones' Settlement*[4] before Astbury J.—and it has never been, until today, before the Court of Appeal. In *Shirley* v. *Fisher*[5] an appointor, having revoked an appointment previously made by him, became (if he did not

---

[1] Ante, p. 440.
[2] (1864) 11 H.L.C. 32.
[3] (1882) 47 L.T. 109.
[4] [1915] 1 Ch. 373.
[5] 47 L.T. 109.

C. A.
1954

GREAVES,
In re.
PUBLIC
TRUSTEE
v.
ASH.

re-appoint) entitled as personal representative of a deceased son to the share of the trust property which had vested in the son in default of appointment. It is true that some of the reasoning of Bacon V.-C. as reported in his judgment is not entirely easy to follow, and Astbury J. in the later case [6] thought that since the Vice-Chancellor was of opinion that there was in any event no evidence of any "fraud," his pronouncement upon the more general question must be regarded as obiter. However that may be, there is no doubt that the general question directly arose in *In re Jones' Settlement* [6] and that Astbury J., after hearing argument upon it, clearly and deliberately answered that question in the affirmative; that is, he held that the principles of a "fraud "on a power" were applicable to a power of revocation in such cases as *In re Jones' Settlement* [6] and the present. Vaisey J. (without expressing any view of his own except to observe the resulting anomaly between a revocation of a power once exercised and a general release of a power) felt it his duty not to "reopen "the general question" but to follow Astbury J.'s decision and to answer the present inquiry in the same sense.

In order to answer the general question posed, it is useful to discover and to state what is the essential quality of the vice which constitutes a fraud on a power. In our judgment the essential characteristic is that the appointor, having assumed the burden of making the appointment, that is, of deciding whether (in preference to allowing the trust in default of appointment to take effect) a selection or discrimination should be made by him among the whole class designated by the creator of the power, and, if so, what kind of selection or discrimination, then proceeds to decide the matter, not with the single view of conferring benefits among the designated class, but with the purpose of procuring the receipt of a material benefit by some person not among the designated class, and to that extent defeating or departing from the intention of the donor of the power. The well-known language of Lord Parker of Waddington in *Vatcher* v. *Paull* [7] may once more be cited: "The real vice of an appointment on condi-"tion that the appointee shall benefit the appointor or a third "party is that the power is used not with the single purpose of "benefiting its proper objects but in order to induce the appointee "to confer a benefit on a stranger."

It is, therefore, in our judgment, fundamental to the vice that the appointor should have assumed the burden of making an appointment which (in such a case as the present) he was never bound to do; and should then have distorted its stated purposes. To that extent he has defrauded the persons entitled in default of appointment; for he has divested such persons of their interests otherwise than for the purposes and in the way limited by the donor of the power. It is for this reason, in our view, that the distinction is drawn between an exercise of a special power of appointment on the one hand, and a release of such a power on the other. The donee of the power being (in such a case as the present) free to exercise or not to exercise the special power as he chooses, is embarrassed by no duty if he prefers the latter alternative. In that event, he leaves things as the donor of the power left them; the persons beneficially entitled have been selected by the donor and it is nihil ad rem that the donee of the special power, the appointor, has decided not to exercise the power, in the expectation that, or because, he will as a consequence receive himself some benefit from one or other of the persons who take in default of appointment. Lord Parker of Waddington thus puts it in the judgment from which we have already quoted [8]: "Nor is there any case in which a bargain to "allow the funds to go in default of appointment, . . . has been "successfully impeached. The limitations in default of appoint-"ment may be looked upon as embodying the primary intention "of the donor of the power. To defeat this intention the power "must be bona fide exercised for the purpose for which it was "given. A bargain or condition which leads to the fund going in "default of appointment can never therefore defeat the donor's "primary intention." We refer also to the language of Chitty J. in *In re Somes* [9]: "There is no duty imposed on the donee of a "limited power to make an appointment; there is no fiduciary "relationship between him and the objects of the power beyond "this, that if he does exercise the power of appointment, he must "exercise it honestly for the benefit of an object or the objects "of the power, and not corruptly for his own personal benefit; "but I cannot see any ground for applying that doctrine to the "case of a release of a power; the donee of the power may, or "he may not, be acting in his own interest, but he is at liberty, "in my opinion, to say that he will never make any appointment "under the power, and to execute a release of it."

---

[6] [1915] 1 Ch. 373.

[7] [1915] A.C. 372, 379.

It follows that if the appointor elects (as he is free to do) not to exercise the special power conferred upon him, he owes no duty to the class of objects of the power; he owes no duty at all.

[8] [1915] A.C. 379.

[9] [1896] 1 Ch. 250, 255; 12 T.L.R. 152.

If we are right so far, then, prima facie at least, the appointor, having made a revocable power of appointment, owes no duty to anyone if he revokes the appointment; if he revokes and does not re-appoint, no one can complain of what he has done, for no one can assert the misuse of a power, namely, the power of appointment. Prima facie, according to the ordinary use of language, if an appointment has been made subject to a power of revocation, then the appointor has reserved to himself a locus poenitentiae, a right to recall the selection or discrimination he has made, to wipe the slate, as it were, clean again, to go back whence he started and to decide afresh, not only what selection or discrimination he will make, but whether he will select or discriminate at all. If he repents of his original selection or discrimination, revokes the appointment he has made and then, without more, releases his power of appointment, he will have, on second thoughts, renounced the power vested in him. The persons entitled to take will be the persons designated by the creator of the trust in the precise event which has happened, that is, the event that the donee of the power to direct a different destination of the trust property will not have effectively availed himself of the opportunity granted to him. As already stated, he is under no positive duty to exercise the power at all. The only relevant duty which he owes is to the persons designated by the donor of the power to take in default of appointment, the duty not to exercise the power of divesting them save strictly to the extent and in the manner prescribed by the donor. No one can, therefore, complain of a fraud on the power if the power has been, in the end, repudiated.

To this reasoning, however, the objection has been raised that the appointor, having once exercised the special power, cannot thereafter disembarrass himself of the duty in which, by such exercise, he has involved himself; so that he cannot revoke the power; he cannot recall what he has done and wipe the slate clean again, save in the exercise of the same " duty " to which he was subject in making the original appointment.

In our judgment this argument is erroneous and, also, logically impossible. The " duty " in relation to any exercise of the power of appointment is no more than a " duty " not to exercise the power otherwise than for the single benefit of the members of the designated class of objects. If, therefore, the " duty " applies to the revocation of an appointment already made, to whom is it owed? Clearly not to the original appointees or to the class of possible appointees; for the donee of the power never owed any duty to them to exercise it at all, and they can, therefore, have no valid ground for complaint if he chooses to recall a revocable exercise of it. Moreover, if the "duty" were held to be owed to these persons, it could only be a duty not to exercise the power of revocation otherwise than for their single benefit; and as revocation per se can never benefit the objects of the power as such, this would mean that the power of revocation could never be exercised save with a view to re-appointment. It has not been suggested that the donee of a special power of appointment, who has once exercised the power, could not in any circumstances revoke the appointment and thereafter wholly release the power. If it were otherwise the donee of a power, if an earlier exercise by him of the power had for any reason failed of effect, would be bound to re-appoint. Equally, in our judgment, the "duty" cannot be owed to the class of possible appointees *plus* the persons to take in default of appointment, since the interests of the latter might be directly in conflict with the interests of the former. Finally, the "duty" cannot be owed to the persons to take in default of appointment, so as (for the first time) to disable the donee of the power from taking or even (we suppose) permitting anyone else to take directly or indirectly any benefit from or through any of such persons: for those persons have taken, once and for all, vested interests granted to them by the original donor, subject only to the power of the appointor wholly or partly to divest them. And revocation without re-appointment must necessarily benefit the persons taking in default as such, so that the conception of a duty to them not to revoke an existing revocable appointment is a contradiction in terms. Further, as the donee of the power is plainly under no obligation to them to revoke the existing appointment but is free to revoke it or not as he pleases, it follows that there is no objection in law to his stipulating for some benefit to himself or some third party as a condition of revocation.

We add that we are not entirely clear upon this argument what it is suggested that the result would be if an appointor, having (as in the present case) reserved a power of revocation by will, by his will merely revoked the appointment previously made by deed, without any further reference to the power of appointment or the trust funds subject thereto.

It was, however, this argument which appears to have prevailed before Astbury J. in *In re Jones' Settlement.*[10] Mr. F. E.

---

[10] [1915] 1 Ch. 373, 376.

Farrer's argument is thus reported: "A power to revoke an "appointment under a limited power is part of that limited "power, and therefore fiduciary. This is shown by the fact that "such a power of revocation cannot be delegated—e.g., joint "appointors cannot reserve a power of revocation to one during "the other's life, though if authorized by the settlement creating "the power they may reserve a power of revocation to them"selves and the survivor. The proposed revocation with the "avowed object of obtaining a benefit is therefore a fraud on the "power." The argument is reflected in the judgment[11]: "In "this particular case, however, the wife's proposal involves not "merely a release of her power, but a revocation of the existing "appointment in favour of the daughter and her children; and "in my opinion a power of revocation and new appointment is "fiduciary and must be exercised for the purposes and objects of "the original power." In our view, Astbury J.'s decision rested on the acceptance of Mr. Farrer's argument. For reasons which we have attempted to state we think that the argument was unsound, and we are unable to agree with the conclusion which was based upon it, and think, accordingly, that the decision in *In re Jones' Settlement*[12] should be overruled.

In our judgment a power to revoke an appointment means what it says—that is, that the appointor can wholly recall what he has done and place himself in all respects in the same position as if he had never made any appointment. In other words, since the power of revocation is free from obligation there can be no "fraud "on the power" by its exercise. It is in truth not so much a power as a right.

In the result the appellant is entitled in our judgment to succeed upon her first point, the more general question. The second point (upon which, however, out of respect for Mr. Jopling's argument we have already indicated our view) does not, therefore, strictly arise.

We add that our judgment is confined to the facts of the present case and to facts strictly analogous thereto; that is, when the following conditions are found: (1) a special power of appointment expressed to be exercisable by deed, revocable or irrevocable, or by will, with a gift over in default of and subject to any such appointment; (2) an exercise of that power by deed expressed to be liable to be revoked at any time; and (3) a subsequent total revocation followed by, or (if you will) coupled with, a general

---

[11] [1915] 1 Ch. 379.

[12] [1915] 1 Ch. 373.

C. A.
1954

GREAVES, *In re.* PUBLIC TRUSTEE *v.* ASH.

release of the power. We can, for example, conceive of a case in which there is conferred a power to revoke previously declared trusts which is so closely related to a power of re-appointment that, as a matter of construction, the former power should be held to be only exercisable for the purposes of, and as an essential step towards, a re-appointment. In such a case we can well understand that, if for any reason the re-appointment were ineffective, the revocation might fall with it so as to leave the original trusts persisting. That kind of case is not before us and we express no opinion, therefore, on it. But in the present case we think that the appeal should be allowed and an order made as prayed in the notice of appeal.

Appeal allowed. Costs of all parties as between solicitor and client to come out of the Trust Fund.

Solicitors: *Vertue & Churcher; Woodcock, Ryland & Co.; for Tweedale, Sons & Lees, Oldham; Kingsford, Dorman & Co.*

E. D.

SMEATON *v.* ILFORD CORPORATION.

[1953 S. No. 2308.]

1954
Feb. 9, 10, 11, 12, 15, 16, 17; *Mar.* 9.

Upjohn J.

Public Health—Sewage—Overflow—Whether local authority liable—Overflow from overcharged sewer—Statutory duty of local authority to permit connexions to sewer—Nuisance—Rylands v. *Fletcher—Public Health Act,* 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 49), *s.* 31.

Rylands v. *Fletcher—Local authority—Applicability of rule to local authority performing statutory duties. Nuisance.*

By section 31 of the Public Health Act, 1936: "A local authority "shall so discharge their functions under the foregoing provisions "of this Part of this Act as not to create a nuisance." The provisions referred to relate to the duties and functions of local authorities with regard to sewers and sewage.

On a number of occasions, which were becoming more frequent, sewage erupted from a manhole in a street near to the plaintiff's house, overflowed into his premises, and caused him considerable damage and discomfort. The sewer was vested in the defendant corporation, and had been constructed before 1898; the defendants took it over from their predecessors, the former urban district council.

The plaintiff brought an action against the defendants claiming damages and an injunction to restrain them from causing or permitting sewage to escape from the sewer so as to occasion a nuisance or a trespass, on the principle of *Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330, or both to him. It was proved or admitted: (1) that, owing to an increase in population the local sewage system had become overloaded; (2) that all but two per cent. of the sewage in the sewer in question came from privately owned premises outside the ownership or control of the defendants; (3) that if the sewer had had a free discharge at its outlet, it would have been just capable in times of heavy rain of carrying the sewage without causing flooding; but (4) that its outlet was into another larger sewer, which itself was at such times so "surcharged" that it caused back pressure in the smaller sewer, and the flooding was caused by the overtaxing of the larger sewer.

The sewer was constructed by the defendants, and they had for many years continued to maintain it in its original condition, well knowing that it was subject to flooding:—

Held, first, dismissing the claim in nuisance, that though the defendants' sewage system had become generally inadequate, the only remedy open on that ground to a person injured was to complain to the Minister—observations of Denning L.J. in *Pride of Derby and Derbyshire Angling Association Ld.* v. *British Celanese Ld.* [1953] Ch. 149, 190 applied; that the defendants were not causing or continuing the nuisance, as it arose from the overloading and not from the sewer itself, and the defendants were bound by statute to accept and had no power to prevent the discharge of sewage from premises in the area; and that if the defendants were to take active steps to divert the overflow on to allotments near the plaintiff's premises, as they might have done, they would be positively causing a nuisance to the occupiers and doing an actionable wrong.

Held, secondly, dismissing the claim in trespass, that, although the defendants did collect sewage on their land, and the cases did not establish the proposition that a local authority was exempt from the principle of absolute liability on the ground that the use of land for sewage collection purposes was a proper use for the general benefit of the community, since to collect into a sewer a large volume of inherently noxious sewage, bound to cause damage if it escaped, was not "a natural user of land," nevertheless the terms of section 31 of the Act of 1936 absolved the defendants from liability under the rule in *Rylands* v. *Fletcher* provided that they did not "create a nuisance"; and that escapes of sewage such as those in question did not, in the absence of negligence, constitute the creation of a nuisance.

Quaere, whether a local authority exercising statutory duties is altogether outside the rule in *Rylands* v. *Fletcher*, or whether it is prima facie within it, subject only to express or implied statutory modification.

Hammond v. *Vestry of St. Pancras* (1874) L.R. 9 C.P. 316, and *Stretton's Derby Brewery Co.* v. *Mayor of Derby* [1894] 1 Ch. 431;

10 T.L.R. 94 applied; *Rylands* v. *Fletcher* (*supra*), and *Pride of Derby and Derbyshire Angling Association Ld.* v. *British Celanese Ld.* [1953] Ch. 149; [1953] 1 All E.R. 179 considered.

ACTION.

The following statement of facts is taken substantially from the judgment: The plaintiff was the owner and occupier of a leasehold dwelling-house and premises known as No. 66, Vicarage Lane, in the borough of Ilford. The defendant corporation was the sanitary authority for the borough, and the plaintiff complained that the defendant corporation were causing or permitting sewage to erupt from time to time from a manhole in Vicarage Lane nearly opposite the plaintiff's premises, which seriously affected him in his occupation of his house and garden.

Not far from Seven Kings Station, Vicarage Lane ran approximately east and west, and a soil and foul water sewer passed under and along Vicarage Lane. Within and towards the north of the catchment area for that sewer were two areas both owned by the defendant corporation, the more northerly being the Oaks Lane Estate and the more southerly being the Suffolk Road Estate. The Vicarage Lane sewer was some 18 inches in diameter, and carried the soil and foul water from the whole of the catchment area and discharged it into a larger 24 inch sewer in Ley Street, to the west of the catchment area.

The soil sewer in question was constructed by the predecessors of the defendant corporation, the Urban District Council of Ilford, some time before the year 1898. The urban district council had since been incorporated into a borough by a charter, the terms of which obliged the borough to assume all the liabilities of the council. The action therefore proceeded on the footing that the defendant corporation were to be treated as the builders of the sewers, which were vested in them as the sanitary authority: see section 20 of the Public Health Act, 1936. The number of houses in the catchment area and served by the soil sewer was now over 3,800. Of these, some 318 were built by the defendant corporation between the years 1946 and 1949 on the Oaks Lane Estate for occupation by tenants. Those houses became fully occupied by tenants by about the middle of 1949.

On the Suffolk Road Estate the defendant corporation had recently erected 60 flats for occupation by tenants, but at the date of the issue of the writ they had not been completed and were not occupied. It was stated, though not proved in evidence, that at the date of the hearing no connexion to any soil sewer had been made for these flats.

It was not disputed that at times of heavy rain there was a serious eruption from the soil sewer in Vicarage Lane of untreated human excreta and other deleterious and malodorous matter. The sewage surged from the sewer up the manhole nearest to the plaintiff's premises, blew off the manhole cover and flooded into the road. The plaintiff's premises, together with the other premises on the south side of Vicarage Lane, were slightly lower than the lane, so that the sewage flooded over the road towards the south.

It ran into the plaintiff's front garden and, until he stopped the damp-course ventilators up, into his house. The sewage then ran by the side of his house on to his back garden and finally ran off into the allotment gardens to the south of his property.

The plaintiff kept a record of the number of times this had happened in the year 1953. It had happened once in April, four times in July, twice in September, three times in October and once in November, and he could remember that it had happened in the previous year. When it happened, it necessitated the most unpleasant operations on the part of the plaintiff, who had to take two or three hours clearing up the very unpleasant mess that it left in his front garden, and it then left a residue of nasty black slime over it. This flooding had been known to exist by the defendant corporation for 20 years at least, but the plaintiff, who had been in occupation of his present premises since 1940, gave evidence that it got worse than it had ever been before some two years ago.

The facts as to flooding were not disputed by the defendant corporation. They admitted that, with the growth of the borough, the whole of their sewage system had become overloaded, and the borough badly needed a new sewage system. Steps towards provision of a new sewage system were taken before the war, but were abandoned during the war, and a revised scheme had since been prepared. The defendant corporation obtained an Act known as the Ilford Corporation Drainage Act, 1950, which empowered them to build a new system at a cost of over £1,400,000. They could not, however, obtain the necessary consent to the raising of the money. It was not suggested that those facts could affect the legal liability of the defendant corporation.

Mr. Cotterell, a civil engineer of experience in drainage matters, gave evidence for the plaintiff which could be summarized as follows.—In times of heavy rain, the total amount of sewage, including the storm water from the houses, which had a partially separate system of drainage flowing down the soil sewer, was rather less than 450 cubic feet per minute at peak periods. Of that total, about 9·4 cubic feet per minute would be attributable to the Oaks Lane Estate—that was, 2 per cent. of the whole—and 0·4 per cent. to the Suffolk Road Estate when connected. If one assumed that the Ley Street sewer was running at anything up to full bore but no more, then the Vicarage Lane sewer could carry the quantity in question without flooding. There would be a great deal of " surcharge," that was to say, the capacity of the Vicarage Lane sewer would be strained to the utmost, and sewage would be rising in the manhole nearest to the plaintiff's property, but it would not quite have exerted sufficient power to lift the manhole cover and erupt into the road and thence into the plaintiff's garden. Those calculations were made upon the assumption, which was not challenged by the plaintiff, that the sewers were kept properly cleansed by the defendant corporation. If, however, the Ley Street sewer was itself in a state of " surcharge," so that sewage was rising up the Ley Street sewer manholes, the effect would be to create a back pressure so that less sewage could come down the Vicarage Lane sewer. Consequently, the pressure there was sufficient to blow off the manhole cover and it would cause flooding opposite the plaintiff's property.

Sir Lynn Ungoed-Thomas Q.C. and *G. H. Newsom* for the plaintiff. If injurious matter escapes on to the plaintiff's premises from a sewer vested in and controlled by the defendants, the defendants are liable in trespass: *Rylands* v. *Fletcher*.[1] If the defendants caused or continued or failed to prevent the escape of injurious matter, they are liable in nuisance. They can escape liability only by establishing a statutory authority to commit the injury in question; such authority must be expressly or impliedly given, or the injury complained of must be the inevitable consequence of what the statute has authorized. [Reference was made to a number of sections in the Public Health Acts, 1875 and 1936.]

The doctrine in *Rylands* v. *Fletcher* has been applied in a number of cases to damage caused by sewage: see *Hobart* v.

---

[1] (1868) L.R. 3 H.L. 330.

1954

SMEATON v. ILFORD CORPORATION.

Southend-on-Sea Corporation[2]; *Jones* v. *Llanrwst U. D. C.*[3]; *Foster* v. *Warblington U. D. C.*[4]; and *Haigh* v. *Deudraeth R. D. C.*[5] It is shown by *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.*[6] that a plea of the exercise of a statutory power does not exclude the rule. If a dangerous thing, which is under the defendants' control, escapes, then the principle applies; and it matters not whether what is done is for private purposes or under a statutory duty.

As to nuisance, the defendants, under the terms of their charter, must be deemed to have constructed the sewer, and are accordingly responsible in law for whatever that entails, subject to whatever statutory exemption there may be. [*Humphries* v. *Cousins*[7] and *Metropolitan Asylum District Managers* v. *Hill*[8] were referred to.] In *Glossop* v. *Heston and Isleworth Local Board*[9] it was held that a plaintiff, who was injured by sewage, had no direct remedy against the defendants, but must apply for mandamus under the provisions of the Public Health Act, 1875; the judgments in the Court of Appeal are not easy to reconcile, but it appears that the court treated the case as one of non-feasance, as the defendants had inherited and not constructed the sewer in question and no nuisance at common law was alleged; the application of the doctrine of non-feasance to cases of this nature was recently criticized in *Pride of Derby and Derbyshire Angling Association Ld.* v. *British Celanese Ld.*[10] Cases similar to that of *Glossop*[11] are *Attorney-General* v. *Dorking Union Guardians*,[12] *Robinson* v. *Workington Corporation*,[13] and *Hesketh* v. *Birmingham Corporation*[14]; all these were regarded as cases of non-feasance.

[UPJOHN J. It seems that until a late stage nobody ever thought of invoking *Rylands* v. *Fletcher* in sewage cases. The *Pride of Derby* case[15] seems to show that the doctrine does not necessarily apply where a local authority is compelled by the Public Health Acts to construct sewers and accept sewage from houses built in their area; that seems to throw doubt on the *Llanrwst*[16] and similar cases.]

---

[2] (1906) 75 L.J.K.B. 305; 22 T.L.R. 307.

[3] [1911] 1 Ch. 393.

[4] [1906] 1 K.B. 648; 22 T.L.R. 421.

[5] [1945] 2 All E.R. 661; 44 L.G.R. 24.

[6] [1914] 3 K.B. 772; 30 T.L.R. 441.

[7] (1877) 2 C.P.D. 239.

[8] (1881) 6 App.Cas. 193.

[9] (1879) 12 Ch.D. 102.

[10] [1953] Ch. 149; [1953] 1 All E.R. 179.

[11] 12 Ch.D. 102.

[12] (1882) 20 Ch.D. 595.

[13] [1897] 1 Q.B. 619; 13 T.L.R. 148.

[14] [1924] 1 K.B. 260.

[15] [1953] Ch. 149.

[16] [1911] 1 Ch. 393.

It is contended that *Rylands* v. *Fletcher* applies in a case where a local authority do nothing, if the sewer is under their control; but whatever may be the effect of *Pride of Derby* on *Llanrwst*, it establishes that a nuisance caused by sewage is actionable, and that a defendant local authority cannot rely on growth of population as a defence. Although the defendants are under a statutory duty to accept sewage from premises in their area, they have increased the nuisance substantially by building the Oaks Lane Estate. It is enough to support a cause of action in nuisance if the defendants themselves have built something more than an infinitesimal number of houses, and it does not lie in the mouth of one of the contributors to a nuisance to say that his contribution is infinitesimal. [*Mayor, etc., of Hawthorn* v. *Kannuluik*,[17] *Attorney-General* v. *Lewes Corporation*,[18] and *Blair* v. *Deakin* [19] were referred to.]

E. Milner Holland Q.C. and *G. T. Hesketh* for the defendants. There is no doubt that *Rylands* v. *Fletcher* has been applied by courts of first instance in sewage cases: see *Jones* v. *Llanrwst U. D. C.*,[20] *Haigh* v. *Deudraeth R. D. C.*,[21] and possibly in the *Pride of Derby* case at first instance [22]; but when the latter case was before the Court of Appeal, Denning L.J. doubted its applicability to the acts of a local authority carrying out a statutory duty.[23] His observations were obiter, but it seems clear that he would have so held had it been necessary. He indicated that the decision in the *Llanrwst* case [24] was inconsistent with *Rickards* v. *Lothian*,[25] *Read* v. *J. Lyons & Co. Ld.*[26] and *Hammond* v. *Vestry of St. Pancras* [27]; it is also inconsistent with *Nichols* v. *Marsland* [28]; the two latter cases do not appear to have been cited in the *Llanrwst* case.[24] To bring the rule into operation, the defendant must collect on his land for his own private purposes a dangerous substance, under circumstances which amount to an unnatural user of the land; then, if the substance escapes and damages the plaintiff, the defendant is liable without proof of negligence. In the present case, first, the defendants did not collect the sewage; they laid a pipe into which others discharged it; secondly, what they did was not for

---

[17] [1906] A.C. 105; 22 T.L.R. 28; [1924] 1 K.B. 264n.

[18] [1911] 2 Ch. 495; 27 T.L.R. 581.

[19] (1887) 57 L.T. 522.

[20] [1911] 1 Ch. 393.

[21] [1945] 2 All E.R. 661.

[22] [1952] 1 T.L.R. 1013; [1952] 1 All E.R. 1326.

[23] [1953] Ch. 149, 189.

[24] [1911] 1 Ch. 393.

[25] [1913] A.C. 263; 29 T.L.R. 281.

[26] [1947] A.C. 156; 62 T.L.R. 646; [1946] 2 All E.R. 47.

[27] (1874) L.R. 9 C.P. 316.

[28] (1875) L.R. 10 Ex. 255.

1954

SMEATON
v.
ILFORD
CORPORATION.

their own purposes, but for the benefit of the community; thirdly, it is not an unnatural user of land to lay a sewer in it for the benefit of the community.

If the rule does not apply, the plaintiff can only rely on nuisance. As to that, it is clear that here there was a mere escape of sewage; there was no deliberate creation of a nuisance by discharging it into a stream. The evidence for the plaintiff wholly fails to support a number of the matters alleged in the statement of claim to constitute a nuisance.

[After a discussion, the statement of claim was amended, as indicated in the judgment, by the deletion of certain allegations.]

As to the allegations now remaining: (1) it is proved that the defendants' Oaks Lane Estate contributes a negligible amount to the flow in the Vicarage Lane sewer; (2) there is no evidence that any discharge into that sewer causes flooding at all; (3) on the evidence the real trouble is that the Ley Street sewer lower down is overloaded, and that is not pleaded. It is far too wide a proposition to say that a defendant is liable for a nuisance merely because he might have done something which would have prevented injury to the plaintiff. On the authorities, if a nuisance exists on a man's property which causes injury to another, and he has a reasonable opportunity to put it right but does not, he is just as liable as he would have been for a deliberate act of commission; but the facts in the present case are quite different. In particular, the plaintiff has no right to make the defendants divert the noxious matter on to someone else; there is no case to support such a proposition.

Sewage cases were extensively reviewed in the *Pride of Derby* case.[29] It was held that the Derby Corporation were expressly prohibited by their local Act from discharging polluting matter into the river; that decision has no bearing on the present case, which is concerned not with wilful discharge but with involuntary escape. The court made observations obiter on *Rylands* v. *Fletcher*, Denning L.J. stating that in his view it did not apply. They considered also the *Glossop*[30] line of cases, without pronouncing a definite conclusion on them. Of these, *Robinson* v. *Workington Corporation*[31] is indistinguishable on the facts from the present case; the Court of Appeal held that the only remedy was under the Public Health Act, 1875, and it was said that the defendant corporation were not liable to the injured plaintiff if all that was complained of was non-feasance. It was not suggested that *Rylands* v. *Fletcher* applied, nor was this suggested in a number of similar cases.

---

[29] [1953] Ch. 149.

[30] See footnotes to the judgment, Nos. 44 to 49.

[31] [1897] 1 Q.B. 619.

The so-called doctrine in *Rylands* v. *Fletcher* was actually enunciated by Blackburn J. in *Fletcher* v. *Rylands*,[32] and has been authoritatively developed in *Nichols* v. *Marsland*,[33] *Rickards* v. *Lothian*,[34] and *Read* v. *J. Lyons & Co. Ld.*[35] It does not apply to an ordinary use of land, or to a use which is of general benefit to the community. It applies to acts done in furtherance of private ends, and to unnatural uses of land. In the present case the defendants do not collect sewage; they are under a statutory obligation to receive it; their reception of sewage in their sewers is for the general benefit of the community; and the construction of sewers in an urban area cannot be said to be an unnatural use of land.

In *Hammond* v. *Vestry of St. Pancras*,[36] where the facts were similar to those of the present case, the plaintiff charged the defendants with a breach of statutory duty in not keeping their sewers cleansed, *Rylands* v. *Fletcher* not being relied on. Brett J. held that where the statutory language is consistent with no absolute duty being thrown on a local authority, it should be construed accordingly, so that the local authority ought to escape liability unless they have shown a want of reasonable care and skill.

In *Jones* v. *Llanrwst U. D. C.*,[37] which was a case of wilful discharge, it was not necessary to apply *Rylands* v. *Fletcher*, though Parker J. did so. His attention was not called to the report in the House of Lords,[38] nor to *Nichols* v. *Marsland*,[39] so the decision may be regarded as given per incuriam and not binding, especially in view of the later decisions of the House of Lords and Privy Council in *Rickards* v. *Lothian*[40] and *Read* v. *J. Lyons & Co. Ld.*[41] In *Green* v. *Chelsea Waterworks Co.*,[42] a case of a burst water-main, the court declined to apply *Rylands* v. *Fletcher*; that case shows the distinction between acts done for private purposes and acts done for the public benefit, and that escapes of water from pipes maintained under statutory duty are not actionable in the absence of negligence. In *Stretton's*

---

[32] (1866) L.R. 1 Ex. 265, 277.

[33] L.R. 10 Ex. 255.

[34] [1913] A.C. 263; 29 T.L.R. 281.

[35] [1947] A.C. 156.

[36] L.R. 9 C.P. 316.

[37] [1911] 1 Ch. 393.

[38] L.R. 3 H.L. 330.

[39] L.R. 10 Ex. 255.

[40] [1913] A.C. 263.

[41] [1947] A.C. 156.

[42] 70 L.T. 547; 10 T.L.R. 259.

Derby Brewery Co. v. *Mayor of Derby*,[43] a case of escape of sewage, *Rylands* v. *Fletcher* was referred to in the argument, but was not applied.

The operations of the defendants with regard to sewage are governed by section 31 of the Public Health Act, 1936, whereby they "shall so discharge their functions as not to create a "nuisance." That means, applying the language of Brett J. in *Hammond* v. *Vestry of St. Pancras*,[44] that the defendants are not liable unless they actually create the nuisance complained of, either by an intentional discharge or by a negligent omission to remedy an escape. It is submitted that the section affords a complete defence in the present case.

Turning to the claim based on nuisance, the plaintiff can only succeed if he proves that the defendants actually created the nuisance, or suffered it to continue, while having the power to prevent it: *Barker* v. *Herbert*[45]; *Sedleigh-Denfield* v. *O'Callaghan*[46]; *Job Edwards Ld.* v. *Birmingham Navigation Proprietors*.[47] Finally, there are the observations of Denning L.J. in the *Pride of Derby* case,[48] which in effect summarize the defence here. None of the facts proved establish a nuisance which is actionable on the authorities.

Sir Lynn Ungoed-Thomas Q.C. replied. The defendants assert that they do not "collect" sewage in their sewers; in fact they collect it in the same way as the individual defendant in *Humphries* v. *Cousins*[49]; the sewage enters a sewer which is their property, is under their control, and was constructed for the purpose of receiving sewage; that must constitute "collecting" within the meaning of *Rylands* v. *Fletcher*.

The next point made is that what the defendants are doing is for the benefit of the community. The observations of Scott L.J. in *Read* v. *J. Lyons & Co. Ld.*[50] show that in examining whether a particular act is or is not for the benefit of the community the test is not the personality of the defendant, but the quality of the act under discussion. In the judgment of Blackburn J. in *Fletcher* v. *Rylands*[51] there was no great significance in the phrase "for his own purposes"; the judgment was directed to contrast what was naturally on the land with what was brought on to it; and the same contrast appears in the speeches in the House of Lords.[52] In *Nichols* v. *Marsland*,[53] Bramwell B. used the expression "beneficial to the community," but his judgment, properly regarded, is not authority for the proposition that any use beneficial to the community is outside the rule in *Rylands* v. *Fletcher*; he was considering a case in which damage had occurred through torrential rainfall amounting to vis major, and his judgment is authoritative on the question whether vis major constitutes a defence. It is laying a very difficult burden on a court to decide whether or not a particular operation is beneficial to the community or is for a particular private purpose, and fine distinctions would arise concerning functions and personalities; there might, for instance, be distinctions between tramway and water supply undertakings owned by companies on the one hand and by municipalities on the other.

---

[43] [1894] 1 Ch. 431; 10 T.L.R. 94.

[44] L.R. 9 C.P. 316.

[45] [1911] 2 K.B. 633; 27 T.L.R. 488.

[46] [1940] A.C. 880; 56 T.L.R. 887; [1940] 3 All E.R. 349.

[47] [1924] 1 K.B. 341.

[48] [1953] Ch. 149, 189.

[49] 2 C.P.D. 239.

[50] [1945] K.B. 216, 228.

[51] L.R. 1 Ex. 265.

[UPJOHN J. There is a line of cases from *Hammond* v. *Vestry of St. Pancras*[54] to *Hesketh* v. *Birmingham Corporation*[55] in which no reference is made to *Rylands* v. *Fletcher*; that might be taken to indicate a general view that the rule did not apply.]

That is a possible comment, but those cases were concerned only with failure to carry out a statutory duty; the plaintiffs were content to limit themselves to that point. On the contrary, the rule was openly invoked in *Hobart* v. *Southend-on-Sea Corporation*,[56] *Foster* v. *Warblington U. D. C.*[57] and *Jones* v. *Llanrwst U. D. C.*[58] The latter case was plainly decided on the basis of *Rylands* v. *Fletcher*, and it cannot be said to have been decided per incuriam when *Hobart's* and *Foster's* cases preceded it; it has never been questioned except by Denning L.J. obiter in the *Pride of Derby* case.[59] Evershed M.R. expressed no decided opinion on the question.[60]

Rickards v. *Lothian*[61] was concerned again with vis major; it was held that the defendant was excused by the malicious act of a third person; in that case Lord Moulton said,[62] after considering *Ross* v. *Fedden*[63] and *Eastern and South African Telegraph Co. Ld.* v. *Cape Town Tramways Companies Ld.*,[64] that if the general benefit of the community was the criterion, it was impossible to know where to draw the line.

---

[52] L.R. 3 H.L. 330.

[53] L.R. 10 Ex. 255.

[54] L.R. 9 C.P. 316.

[55] [1924] 1 K.B. 260.

[56] 75 L.J.K.B. 305; 22 T.L.R. 307.

[57] [1906] 1 K.B. 648.

[58] [1911] 1 Ch. 393.

[59] [1953] Ch. 149, 189.

[60] Ibid. 176.

[61] [1913] A.C. 263.

[62] Ibid. 280.

[63] (1872) L.R. 7 Q.B. 661.

[64] [1902] A.C. 381; 18 T.L.R. 523.

As to the defence of statutory authority, the rule is that the exercise of statutory functions is subject to private rights, unless the statute by express words or by necessary implication overrides such rights; a nuisance cannot be defended unless it is a necessary and inevitable consequence of the acts authorized by the statute: *Metropolitan Asylum District* v. *Hill.*[65] In *Green* v. *Chelsea Waterworks Co.*[66] the defendants were under a statutory obligation to keep their mains filled with water, and in the absence of negligence were held not liable for the consequences of a burst; in the present case there is no statutory obligation in the defendants to have their sewers surcharged or under pressure; Parliament does not contemplate full sewers as it contemplates full water-mains.

As to nuisance, the effect of the increase of flow in the Vicarage Lane and Lay Street sewers is as if a brick wall had been put across the mouth of the Vicarage Lane sewer. The defendants have known quite well what has been going on over the years, and their conduct in allowing the trouble to develop cannot be regarded as purely negative conduct; they have wrongfully failed to prevent the nuisance.

Cur. adv. vult.

March 9, 1954. UPJOHN J. stated the facts and continued: I am satisfied, and find as a fact, that this eruption or flooding from the manhole in time of heavy rain causes the plaintiff and his family grave inconvenience, and it constitutes a serious deprivation of the ordinary and reasonable enjoyment of his property and its amenities which he is entitled to expect. The effect of Mr. Cotterell's evidence, it seems to me, is that the cause of the flooding is not the inadequacy of the Vicarage Lane sewer but the fact that the capacity of the Ley Street sewer is itself overtaxed. I think that the matter may be tested in this way: short of making some tank for temporary storage, it would be of no use at all enlarging the Vicarage Lane sewer unless the Ley Street sewer is first enlarged. That seems to me a conclusion which must necessarily follow from the evidence given by Mr. Cotterell. On those facts, the plaintiff puts his claim in two alternative ways. He says, first, that the principle of *Rylands* v. *Fletcher*[1] is applicable to the case and that the corporation are absolutely responsible for any escape from the manhole which damages the plaintiff's property. Secondly, he says that the defendant corporation have wrongfully caused or wrongfully failed to prevent a nuisance to him as occupier of his premises by causing or permitting the sewage matter to erupt from the manhole on to his premises. Negligence is not alleged.

---

[65] 6 App.Cas. 193.

[66] 70 L.T. 547.

[1] (1868) L.R. 3 H.L. 330.

It will be convenient for the purposes of this judgment to define the word " discharge " as meaning a discharge caused or permitted by the local authority through defined orifices or channels, built for the purpose of carrying away sewage, for the construction or maintenance of which they are responsible, on to the land of adjoining or neighbouring owners or into natural watercourses to the prejudice of lower riparian owners; and by the word " escape " to mean an involuntary escape from the sewage system of the local authority, for example, through the bursting of a sewer or, as in this case, by escape from manholes owing to the incapacity of the sewer to carry away the sewage in times of heavy rain.

The textbook writers are at variance on the question whether the principle of *Rylands* v. *Fletcher*[2] is truly a particular example of the general law relating to nuisance or ought to be treated as something sui generis. I do not propose to enter that controversial field, but, solely for the purpose of defining the language I use in this judgment, I propose to use the phrases " liability in nuisance " or " nuisance," on the one hand, and " absolute liability," on the other, as contrasting terms. Thus, if a man is absolutely liable on the principle of *Rylands* v. *Fletcher*,[2] he is liable not only for discharges but escapes. On the other hand, a person is liable in nuisance to an adjoining or neighbouring occupier if he himself causes a nuisance; for example, if he discharges sewage over the land of the occupant to his damage, or if he knows of an existing nuisance emanating from his own land but " continues " it by failing to take reasonable steps to prevent it. See *Barker* v. *Herbert*,[3] a case of nuisance adjoining a highway which was treated, however, as of general application in *Sedleigh-Denfield* v. *O'Callaghan*.[4] In my judgment, in order to establish liability for continuing a nuisance by failing to prevent it, one must necessarily prove that the person so failing must be in a position to take effective steps to that end. The point did not arise directly for decision in those cases, but I respectfully think that Lord Atkin was speaking with exact accuracy when he said in the last-mentioned case[5]: " In my

---

[2] L.R. 3 H.L. 330.

[3] [1911] 2 K.B. 633; 27 T.L.R. 488.

[4] [1940] A.C. 880; 56 T.L.R. 887; [1940] 3 All E.R. 349.

[5] [1940] A.C. 880, 899.

"opinion the defendants clearly continued the nuisance for they "come clearly within the terms I have mentioned above, they "knew the danger, they were able to prevent it, and they "omitted to prevent it." A person may also be liable in nuisance if he "adopts" a nuisance by making any use of the erection, building, bank or artificial contrivance which constitutes the nuisance; see *per* Lord Maugham.[6]

I propose to deal first of all with liability in nuisance. The plaintiff, in his re-amended statement of claim, relied on a number of matters to support his claim in nuisance, but, at the close of his case, he very properly abandoned some of them, and the only remaining claims are now set out in paragraphs 6, 8, 9, 13 and 14 of his statement of claim, and I will deal with them in order, reading the relevant paragraphs as I permitted them to be informally further amended at the close of the plaintiff's case.

Paragraph 6 alleges that the said soil sewer was constructed by the defendant corporation. That is admitted, but it is no longer alleged that it was constructed in a defective manner or that it was originally inadequate for the needs of the neighbourhood. No doubt the defendant corporation's whole sewage system has now become totally inadequate to deal with the increased volume of sewage which it now has to carry, but that cannot give rise to a claim for nuisance; the only remedy of the injured party is to complain to the Minister; see *Pride of Derby and Derbyshire Angling Association Ld.* v. *British Celanese Ld.*, *per* Denning L.J.,[7] where he referred to the earlier cases.

Paragraph 8 is in these terms: "Defendants have erected over "300 houses on their Oaks Lane Estate. The sewage from all "such houses is discharged by the defendants into the said soil "sewer." That, again, is admitted, and it follows that the defendant corporation are responsible for causing something up to two per cent. of the sewage from the whole catchment area to pass into the sewer. However, there was no evidence before me that the connexion made to the Vicarage Lane sewer in 1949, when the flats were already fully occupied, sensibly increased the flooding. The only increase of which I have heard has been in the last two years. Mr. Cotterell in his evidence never stated that the discharge from this estate was a cause of the flooding. This is not at all the case of a local authority connecting up a large new building estate to an existing sewer which is entirely inadequate to deal with the increased quantity of sewage. The

[6] [1940] A.C. 894.

[7] [1953] Ch. 149, 190; [1953] 1 All E.R. 179.

plaintiff submits that the defendant corporation are causing, or at any rate contributing to the cause of, the flooding by putting an additional two per cent. of the sewage into the sewer which the defendant corporation well knew had an insufficient outlet at the Ley Street end. That is an attractive argument, but on the whole I do not think it is correct. The flooding is caused, or partly caused, by the sewage from the Oaks Lane Estate in this sense, that there would be no flooding if there was no sewage or only a small quantity of sewage coming in the sewer at all. But the evidence of Mr. Cotterell establishes that the real cause of the flooding is not the inability of the Vicarage Lane sewer to take all the sewage poured into it, although it is only just sufficient in times of heavy rain, but the inability of the Ley Street sewer to carry it away; and, in my judgment, the plaintiff's claim under this head fails. The plaintiff in his statement of claim does not complain of the insufficiency of the Ley Street sewer. Even if I were to come to a different conclusion, it is admitted that under this head of complaint an injunction would have to be limited to restricting a discharge from the Oaks Lane Estate, and, in the particular circumstances of this case, I should hesitate long before granting any such injunction, which would not appear to benefit the plaintiff in any way.

The next complaint is contained in paragraph 9. That relates to the Suffolk Road Estate and the same considerations apply as to the Oaks Lane Estate, but with these differences: first, the discharge of sewage contemplated from that estate is only 0·4 per cent. of the total intake and, secondly, the sewer from that estate has not yet been connected. I say no more about that claim.

The next complaint is in paragraph 13 in these terms: "The "defendants have for many years continued to maintain the said "soil sewer constructed as hereinbefore mentioned, well knowing "that the same caused flooding in Vicarage Lane and the premises "adjacent thereto." That again is admitted.

No doubt the defendant corporation are bound to provide and maintain the sewers (see section 14 of the Public Health Act, 1936), but they are not thereby causing or adopting the nuisance. It is not the sewers that constitute the nuisance; it is the fact that they are overloaded. That overloading, however, arises not from any act of the defendant corporation but because, under section 34 of the Public Health Act, 1936, subject to compliance with certain regulations, they are bound to permit occupiers of premises to make connexions to the sewer and to discharge their sewage therein, and that, excluding the Oaks Lane Estate, accounts for 98 per cent. of the sewage in the sewer. Nor, in my judgment, can the defendant corporation be said to continue the nuisance, for they have no power to prevent the ingress of sewage into the sewer.

The last ground of complaint is in paragraph 14 in these terms: "By reason of the matters hereinbefore stated, the defendants "discharge the excess sewage in times of rain from the said man-"hole in Vicarage Lane on to an area of allotment gardens belong-"ing to the defendants and lying south of the plaintiff's premises "through the plaintiff's premises in preference to discharging the "same by a route to the west of No. 62 Vicarage Lane where the "defendants' said allotments abut immediately on Vicarage "Lane."

Briefly, the plaintiff contends that his cause of action is flooding of his property and not flooding generally and that, as the sewer ultimately floods to the allotment gardens anyway, the defendant corporation ought to take the sewage there by direct means. No-one disputes the right of the plaintiff to erect a wall round his property to prevent flooding on his own land, although it may cause additional injury to adjoining owners, but, if the defendant corporation take active steps by building walls or channels or pipes so as to canalize the sewage directly on to the allotments, it seems to me plain that they would then themselves be causing a nuisance to the occupants of those allotments and liable in an action for nuisance by such occupants. It would no longer be a case of escape but discharge. This court could not properly make an order which would, as it seems to me, inevitably cause an actionable wrong to the adjoining occupiers.

In my judgment, the plaintiff therefore fails to establish that the defendant corporation have caused, continued or adopted a nuisance, and this part of his action fails.

I must now turn to the very difficult question whether the rule in *Rylands* v. *Fletcher*[8] applies to the flooding from the Vicarage Lane sewer. If the principle of *Rylands* v. *Fletcher* is applicable, the defendant corporation are plainly liable for the escape from their sewer, and it is not suggested that they can avoid liability on the ground of vis major. The locus classicus for the principle is to be found in the judgment of Blackburn J. in *Fletcher* v. *Rylands*[9] in the following passage which was quoted with approval when the case reached the House of Lords: "We "think that the true rule of law is, that the person who for his

---

[8] L.R. 3 H.L. 330.

[9] (1866) L.R. 1 Ex. 265, 279.

1954

SMEATON
v.
ILFORD
CORPORATION.

Upjohn J.

"own purposes brings on his lands and collects and keeps there "anything likely to do mischief if it escapes, must keep it in "at his peril, and, if he does not do so, is prima facie answerable "for all the damage which is the natural consequence of its "escape. He can excuse himself by showing that the escape was "owing to the plaintiff's default; or, perhaps, that the escape was "the consequence of vis major or the act of God; but as nothing "of this sort exists here, it is unnecessary to inquire what excuse "would be sufficient. The general rule, as above stated, seems "on principle just. The person whose grass or corn is eaten down "by the escaping cattle of his neighbour, or whose mine is flooded "by the water from his neighbour's reservoir, or whose cellar is "invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his "neighbour's alkali works, is damnified without any fault of his "own; and it seems but reasonable and just that the neighbour, "who has brought something on his own property which was not "naturally there, harmless to others so long as it is confined to "his own property, but which he knows to be mischievous if it "gets on his neighbour's, should be obliged to make good the "damage which ensues if he does not succeed in confining it to "his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should "at his peril keep it there so that no mischief may accrue, or "answer for the natural and anticipated consequences. And upon "authority, this we think is established to be the law whether "the things so brought be beasts, or water, or filth, or stenches."

In *Rylands* v. *Fletcher*,[10] the court was in fact dealing with an escape of water, but the same principle was applied as between adjoining owners in relation to sewage in *Humphries* v. *Cousins*.[11]

So far as the researches of counsel go, this principle was first applied in sewage disposal cases against local authorities in the year 1906 by Buckley J. in *Hobart* v. *Southend-on-Sea Corporation*, where he said this [12]: "The plaintiff is entitled to the enjoyment of a several fishery; he has a right to enjoy the land for the "purpose of laying oysters there. That right of his in the land "is interfered with by nuisance caused by the discharge by the "defendants from their pipes of offensive matter in such a way "as that it reaches the plaintiff's layings. Upon the principle of "*Fletcher* v. *Rylands* [13] and the decisions upon which that case

[10] L.R. 3 H.L. 330.

[11] (1877) 2 C.P.D. 239.

[12] (1906) 75 L.J.K.B. 305, 308; 22 T.L.R. 307.

[13] L.R. 1 Ex. 265.

"is founded, the defendants must keep their noxious matter from "trespassing upon their neighbour's land. *Tenant* v. *Goldwin*[14] "is an express authority upon this point."

That decision was referred to with approval by Vaughan-Williams L.J. in the Court of Appeal in the same year in *Foster* v. *Warblington U. D. C.*[15] The same principle was stated by Parker J. in *Jones* v. *Llanrwst U. D. C.* in an oft-quoted passage.[16] That case was expressly followed by Vaisey J. in *Haigh* v. *Deudraeth R. D. C.*,[17] and by Harman J. in *Pride of Derby and Derbyshire Angling Association* v. *British Celanese.*[18] Sir Lynn Ungoed-Thomas, for the plaintiff, forcibly argues that I should consider these authorities, extending over a period of nearly 40 years, to be binding upon me. It is to be observed, however, that all those cases were cases of discharge and the plaintiff would have succeeded in an action for nuisance without invoking the principle of absolute liability, though no doubt they must all be treated as direct decisions upon the applicability of the rule in *Rylands* v. *Fletcher.*

When the *Pride of Derby* case[19] went to the Court of Appeal, the members of the court clearly decided the liability of the defendants upon the ground of nuisance and left open the question of absolute liability. Sir Raymond Evershed, M.R., said this[19]: "It was suggested that local authorities have a special immunity "from the so-called rule in *Rylands* v. *Fletcher.* I am not, as "at present advised, satisfied that that is certainly so. Parker J. "clearly applied the rule in *Jones* v. *Llanrwst U. D. C.*[20] So "far as relevant to the facts as they are in the present case, I "think that the result is the same whether that which is complained of would render the doer of the act liable on the "grounds of nuisance or on the grounds of the rule in *Rylands* "v. *Fletcher* (if applicable); in either case the question depends "on whether the Public Health Act or the special Act, as the "case may be, provides, on the principles stated, a defence to "the claim which otherwise would lie." Denning L.J. went rather further and said this[21]: "In this case, negligence is not "alleged. The only cause of action available to the plaintiffs is "an action for nuisance. I pause here to say that I doubt "whether the doctrine of *Rylands* v. *Fletcher* applies in all its

---

[14] (1704) 1 Salk. 360.

[15] [1906] 1 K.B. 648, 670; 22 T.L.R. 421.

[16] [1911] 1 Ch. 393, 405; sub nom. *Isgoed-Jones* v. *Llanrwst U. D. C.*, 27 T.L.R. 133.

[17] [1945] 2 All E.R. 661.

[18] [1952] 1 T.L.R. 1013; [1952] 1 All E.R. 1326.

[19] [1953] Ch. 149, 176.

[20] [1911] 1 Ch. 393.

[21] [1953] Ch. 149, 189

"strictness to cases where a local authority, acting under "statutory authority, builds sewers which afterwards overflow, "or sewage disposal works which later pour out a polluting "effluent, for the simple reason that the use of land for drainage "purposes by the local authority is 'such a use as is proper for "'the general benefit of the community,' and is on that ground "exempt from the rule in *Rylands* v. *Fletcher*, see *Rickards* v. "*Lothian*, *per* Lord Moulton,[22] approved by the House of Lords "in *Read* v. *J. Lyons & Co. Ld.*,[23] *per* Lord Simon[24] and *per* "Lord Uthwatt,[25] and also on the ground of statutory authority, "see *Hammond* v. *Vestry of St. Pancras*,[26] *per* Brett J." That passage in the Lord Justice's judgment is really the foundation of the attack by the defendant corporation upon the principle of absolute liability.

Mr. Milner Holland, for the defendant corporation, argued that the principle of absolute liability did not apply for four reasons: (1) the defendant corporation do not collect the sewage on to their own land; (2) the defendant corporation do not collect it for "their own purposes" but in contrast "for the benefit of the "community" and the principle is applicable only to the former case; (3) the construction and use of a sewer for the benefit of the inhabitants is not an unnatural use of land such as to bring the principle into play; and (4) the principle does not apply to persons who are acting under statutory duty.

On the first point, no doubt the defendant corporation are under a duty to provide sewers and a sewage disposal system; the sewers vest in them, and they are bound to permit owners and occupiers of premises to discharge sewage into their sewers. I have already referred to the relevant sections of the Public Health Act, 1936, which re-enacted sections to the same effect in the Public Health Act, 1875. It is said that, in those circumstances, it is not correct to speak of the defendant corporation as collecting sewage on their own land. I reject that contention. The defendant corporation do collect, although they may be under a duty to do so, and they collect it into a sewer vested in them.

On the second point, Mr. Milner Holland properly drew my attention to the use of the words "for his own purposes" in *Fletcher* v. *Rylands*,[27] and in some subsequent cases, and he contrasted that with uses "beneficial to the community." Apart from authority, I see much difficulty in drawing a line between the two types of user unless, which is not suggested, the latter class be confined to charitable operations as understood in these courts. I agree with Sir Lynn Ungoed-Thomas' submission that " what is beneficial to the community " cannot depend on the personality of the owner of the land who brings the substance on to it, but must depend entirely on the act under discussion. To collect and dispose of sewage is clearly beneficial to the community: so is the provision of water, and that must be so whether the undertaker providing the water does so as a local authority or for his own purposes in the sense of making private profit. The provision of industrial water (that is, water under pressure for operating hydraulic lifts and other operations) seems also beneficial to the community, but undertakers have been held to be absolutely liable (*Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.*,[28]), a case to which I shall return later. The provision of transport is plainly beneficial to the community, whether carried on for profit or by a local authority, yet can it be that a transport authority is not, but a profit-making company is, absolutely liable for permitting an escape of oil and filth from their depot. The provision of theatres and cinemas may be regarded as beneficial to the community, but equally the proprietors may be using the land for their own purpose in that they attract the public to make a profit. The same was true of coal mining operations, at any rate before nationalization, and of many ordinary trading operations, and no satisfactory definition contrasting and defining the two conceptions was suggested to me.

---

[22] [1913] A.C. 263, 280; 29 T.L.R. 281.

[23] [1947] A.C. 156; 62 T.L.R. 646; [1946] 2 All E.R. 471.

[24] [1947] A.C. 156, 169.

[25] Ibid. 187.

[26] (1874) L.R. 9 C.P. 316, 322.

[27] L.R. 1 Ex. 265, 279.

In support of the proposition I was referred to certain authorities. The first was *Nichols* v. *Marsland*,[29] in the Court of Exchequer. There Bramwell B. referred [30] to a " reasonable " use of property in a way beneficial to the community," but it is clear that he was contrasting such user with the man who kept a tiger for his own amusement and whose chain was sundered by lightning. As I read his remarks, he was not saying that the principle of absolute liability applied to the latter but not to the former case; he was saying that in the former case the owner, who was prima facie absolutely liable, would be excused from that liability if the escape occurred through the act of a third party, or vis major, whereas the keeper of a tiger might be liable even where the chain was sundered by an act of God. It seems to me clear that Bramwell B. spoke of reasonable use of property in a way beneficial to the community as including ordinary trading operations, for he included in such user a man who built "for his "own purposes" a chimney 50 feet high.

---

[28] [1914] 3 K.B. 772; 30 T.L.R. 441. [30] Ibid. 260.

[29] (1875) L.R. 10 Ex. 255

That authority seems to me to be against, rather than in favour of, Mr. Holland's proposition. When the case went to the Court of Exchequer Chamber, it turned entirely on a question of vis major.

The next authority relied upon was *Rickards* v. *Lothian*,[31] a decision of the Privy Council, the judgment being delivered by Lord Moulton. In that case, an overflow from a lavatory basin on the top floor of a building overflowed and damaged the occupiers of a lower floor, the overflow being caused by the malicious act of a third party. The Privy Council decided that, assuming the principle of absolute liability to apply, the owner of the upper storey was excused, as the escape was the malicious act of a third party. But Lord Moulton continued[32]: "It is not every use to "which land is put that brings into play that principle. It must "be some special use bringing with it increased danger to others, "and must not merely be the ordinary use of the land or such "a use as is proper for the general benefit of the community." That case, in my judgment, sought to establish the proposition that to bring water on to land for ordinary domestic purposes did not bring into play the principle of *Rylands* v. *Fletcher*. That had already been decided in *Ross* v. *Fedden*,[33] a decision in the Court of Queen's Bench on appeal from a county court, of which Blackburn J. was a member, though for myself I do not find it easy to discover the exact principle upon which it was decided.

In *Humphries* v. *Cousins*,[34] the court distinguished that case on the not very satisfactory ground that *Rylands* v. *Fletcher* applied to adjoining owners but not subjacent owners in the same house.

Mr. Holland also relied on *Green* v. *Chelsea Waterworks Co.*,[35] to which I shall refer later. The distinction in that case, however, was not between user for his own purposes and purposes beneficial to the community, but between his own purposes and statutory purposes.

With all respect to the observations of Denning L.J. in the *Pride of Derby*[36] case, to which I have already referred, in my judgment, the authorities do not establish the proposition that a local authority is exempt from the principle of absolute liability on the ground that use of land for sewage collection purposes is such a use as is proper for the general benefit of the community. I differ from him with the less hesitation as junior counsel before me, both of whom were engaged in the *Pride of Derby* case, tell me that *Rickards* v. *Lothian* [37] was not cited to him in argument, nor was the principle now under review discussed, while I have had the advantage of a very full debate upon the matter. I will only add that the approval given to *Rickards* v. *Lothian* [37] by Lord Simon and Lord Uthwatt in *Read* v. *J. Lyons & Co. Ld.*[38] was only in general terms, the actual decision in that case not being on this point at all.

---

[31] [1913] A.C. 263.

[32] Ibid. 280.

[33] (1872) L.R. 7 Q.B. 661.

[34] 2 C.P.D. 239.

[35] (1894) 70 L.T. 547; 10 T.L.R. 259.

[36] [1953] Ch. 149, 189.

The next proposition sought to be established, namely, that this is a natural user of the land, or, perhaps more accurately, not such an unnatural user as to bring the principle of absolute liability into play, in a sense stems from the last proposition, and Mr. Holland relied on the cases of *Rickards* v. *Lothian* [39] and *Ross* v. *Fedden*,[40] to which I have already referred, and to some extent on some observations of the late Lord Simon in *Read* v. *J. Lyons & Co. Ld.*[41] Those observations do, at all events, show that what is or is not a natural user of land for the purposes of the rule awaits authoritative determination.

I confess that, apart from authority, I should have thought that to bring water for domestic purposes into a dwelling-house and to erect and use a privy therein were characteristically the same type of user of land. I should have held that a man who permitted an escape, either of water from his pipes or sewage from his privy, would be under the same type of liability: that is, he would either be subject to the rule of absolute liability on the ground that he has brought water and sewage not naturally there upon his land, or be exempt for the reason that user in each case is a normal and natural user of the land. Yet, as I have shown, Lord Blackburn himself has stated that to allow an escape of filth from his privy brings the principle of absolute liability into play, while to permit an escape from a domestic water supply does not. It may be that the distinction between the two classes is to be found in *Humphries* v. *Cousins* [42] or turns upon the fact that, while sewage is inherently noxious, water is not, though the latter, when it escapes, may do just as great or greater damage than the former. Whatever may be the law, however, as regards use of land for ordinary domestic purposes, in my judgment, different considerations arise when a local authority collects, even though under a duty to do so, large quantities of sewage which they are bound to dispose of. To collect into a sewer a large volume of sewage, inherently noxious and dangerous and bound to cause great damage if not properly contained, cannot be described, in my judgment, as a natural user of land. Accordingly, in my judgment, a local authority cannot claim exemption from the rule on this point. If I held otherwise, I should be disregarding the long line of authority typified by the *Llanrwst*[43] case, and I do not think that it is open to me so to hold, even if I were disposed to do so.

---

[37] [1913] A.C. 263.

[38] [1947] A.C. 156.

[39] [1913] A.C. 263.

[40] L.R. 7 Q.B. 661.

[41] [1947] A.C. 156, 169, 170.

[42] 2 C.P.D. 239.

Mr. Holland's fourth point is that a local authority carrying out statutory duties is not liable on the principle of *Rylands* v. *Fletcher* at all. Before referring to the two cases on which he particularly relies, it will be convenient to refer to a long line of cases which he says, and says rightly, also supports his submission. They start with *Glossop* v. *Heston & Isleworth Local Board*,[44] which was followed in *Attorney-General* v. *Dorking Union Guardians*[45]; *Stretton's Derby Brewery Co.* v. *Mayor of Derby*[46]; *Robinson* v. *Workington Corporation*[47]; *Harrington* v. *Derby Corporation*[48] and *Hesketh* v. *Birmingham Corporation*.[49] I do not propose to review those cases in any detail, but in each case (except possibly *Lord Harrington's* case, which was a very special case) the local authority were held not liable for permitting a discharge through sewers which they inherited from an earlier local authority (*Glossop* and *Dorking*) or for an escape from sewers or watercourses which they had themselves constructed (*Stretton's Derby Brewery*, *Robinson* and *Hesketh*).

The importance of these cases is that in not one of them was it suggested that the principle of *Rylands* v. *Fletcher* had any application. In no case was *Rylands* v. *Fletcher* mentioned, according to the reports, except in *Stretton's Derby Brewery* case. In that case the plaintiffs did not rely on *Rylands* v. *Fletcher*, but counsel for the defendants arguendo said[50] "the defendants are "not within the doctrine of *Rylands* v. *Fletcher* for they are not "bound to warrant that their sewer will retain what is sent in to "it." According to the report, the remark appears to have passed without challenge.

---

[43] [1911] 1 Ch. 393.

[44] (1879) 12 Ch.D. 102.

[45] (1882) 20 Ch.D. 595.

[46] [1894] 1 Ch. 431; 10 T.L.R. 94.

[47] [1897] 1 Q.B. 619; 13 T.L.R. 148.

[48] [1905] 1 Ch. 205; 21 T.L.R. 98.

[49] [1924] 1 K.B. 260.

[50] [1894] 1 Ch. 431, 437.

It is said that if the rule in *Rylands* v. *Fletcher* applied, then in each case the decision would have been the other way. I am not satisfied that that is right, at any rate in relation to the three escape cases, but at all events the criticism can be made that no one appeared to think that the rule had any relevance, and in the three escape cases there was no discussion in any judgment whether the relevant statutory provisions abrogated or limited the rule.

It was further submitted, and, in my judgment, rightly, that *Robinson's* case [51] was on its facts indistinguishable from the present, and I must refer to it. It was an action to recover damages for injuries sustained through the insufficiency of a sewer vested in and constructed by [52] the borough of Workington. The sewer was adequate at the time it was built, but became inadequate when a number of new houses were built and drained into the sewer. The result was that the sewage overflowed and backed into the plaintiff's houses causing the injury complained of. The Court of Appeal held that the action failed and that the plaintiff's only right was to complain to the Local Government Board under section 299 of the Public Health Act, 1875.

Lord Esher M.R. said this [53]: "It is obvious that the drains "were efficiently built, and were not out of repair. There is no "evidence to support the action on this ground, and the real "complaint is that the defendants had not caused to be made "such sewers as were necessary for effectually draining their "district. Whether, as has been suggested, this obligation "relates to sewers for draining the whole district, I do not say; "but assuming that the case can be brought within section 15 of "the Act, and that the defendants are in default, that is an act "of non-feasance on their part, and not an act of misfeasance. "If it were not for the statute, there would be no duty on the "defendants to do anything in the matter, and a default on "their part is dealt with by a remedy provided by the same "statute. I have no hesitation in saying that that is the only "remedy which is available. It has been laid down for many "years that, if a duty is imposed by statute which but for the "statute would not exist, and a remedy for default or breach "of that duty is provided by the statute that creates the duty, "that is the only remedy. The remedy in this case is under "section 299, which points directly to section 15, and shows "what is to be done for default of the duty imposed by that

---

[51] [1897] 1 Q.B. 619.

[52] See [1953] Ch. 149, 177.

[53] [1897] 1 Q.B. 619, 621.

1954

SMEATON
v.
ILFORD
CORPORATION.

Upjohn J.

"section. That is not the remedy sought for in this action, "which is brought to recover damages." The other members of the court delivered judgments to the same effect.

The distinction between non-feasance and misfeasance as forming a basis for the explanation of these cases, however, appealed neither to Sir Raymond Evershed M.R. nor to Denning L.J. in the *Pride of Derby*[54] case. The *Glossop*[55] line of cases certainly seems to have proceeded on the basis that there was no absolute liability upon a local authority to prevent an escape of sewage and, further, they were not even liable for a discharge through inherited sewers unless they were negligent. Liability in such cases, it seems, was determined upon the footing that there was no liability unless it was imposed by statute upon the local authority upon whom the statutory duty to construct or maintain the sewers was imposed. Lord Esher's views in the passage which I have quoted could not be clearer. I find it impossible to reconcile the principles upon which these cases proceeded with the principle laid down in the *Llanrwst*[56] line of cases, and I do not propose to add to the many pages of the law reports which have been devoted to attempts to explain them. It may be that, having regard to the manner in which the plaintiff's claim in each of the *Glossop*[57] line of cases was framed, namely, on the basis of a breach of statutory duty, the point was never seriously considered. It may be noted in passing that Buckley J., who decided the *Harrington*[58] case in 1904, himself introduced the principle of absolute liability two years later in the *Southend*[59] case.

This brings me to the two cases on which Mr. Holland particularly relies in support of his proposition. The first is *Hammond* v. *Vestry of St. Pancras*.[60] In that case a sewer vested in the local authority became choked up without negligence on the part of the authority and "escaped" on the plaintiff's land. The plaintiff brought an action against the vestry, charging them with breach of their duty under section 72 of the Metropolis Local Mangement Act, 1855, to keep their sewers cleansed. *Rylands* v. *Fletcher*[61] was not relied on. Brett J. said this[62]: "It would seem to me to be contrary to "natural justice to say that Parliament intended to impose upon

---

[54] [1953] Ch. 149.
[55] 12 Ch.D. 102.
[56] [1911] 1 Ch. 393.
[57] 12 Ch.D. 102.
[58] [1905] 1 Ch. 205.
[59] 75 L.J.K.B. 305.
[60] L.R. 9 C.P. 316.
[61] L.R. 3 H.L. 330.
[62] L.R. 9 C.P. 316, 322.

1954

SMEATON
v.
ILFORD
CORPORATION.

Upjohn J.

"a public body a liability for a thing which no reasonable care "and skill could obviate. The duty may notwithstanding be "absolute: but, if so, it ought to be imposed in the clearest "possible terms. The intention of the legislature is to be "gathered from the language used and the subject-matter. "Where the language used is consistent with either view, it "ought not to be so construed as to inflict a liability, unless the "party sought to be charged has been wanting in the exercise "of due and reasonable care in the performance of the duty "imposed. According to my view of section 72, therefore, the "vestry or district board are not to be held liable for not keeping "their sewers cleansed at all events and under all circumstances; "but only where by the exercise of reasonable care and diligence "they can and ought to know that they require cleansing, and "where by the exercise of reasonable care and skill they can be "kept cleansed."

The next case, *Green* v. *Chelsea Waterworks Co.*,[63] as its name implies, was concerned not with a sewer but with water supplied by an undertaker having statutory powers. The headnote is this: "A main belonging to a waterworks company burst, "and the water flooded the plaintiffs' premises, causing considerable damage. Held, that the company being authorized "by Act of Parliament to lay the main, and having been guilty "of no negligence, were not liable in damages to the plaintiffs." Lindley L.J. (with whom the other Lords Justices concurred) said this[64]: "It was argued that the company were liable by "reason of the doctrine in *Rylands* v. *Fletcher*, and it was said "that this was like the case of a landowner who stores water on "his land so as to become a source of danger to his neighbours, "and that consequently the defendants were bound to show that "they were relieved by the Acts of Parliament under which the "company was constituted from the duty of keeping the water in "their pipes. The fault of that argument is in the major proposition. *Rylands* v. *Fletcher* was not a case of a company "authorized to lay down water pipes by Act of Parliament. It "was a case of a private individual storing water on his own "land for his own purposes." Then, after quoting from *Rylands* v. *Fletcher*, the Lord Justice continued[65]: "It is possible that "that principle might have been applied to companies having "statutory authority to make railways or carry water, but the

---

[63] 70 L.T. 547.

[64] Ibid. 548.

[65] Ibid. 549.

"court has declined to extend it to such cases. The same argument was used without success in the case of *Dunn* v. *Birmingham Canal Co.*,[66] where, without any negligence on the part of "the company, water from the canal had flooded the plaintiff's "mine. It was there held that the defendants were not liable "expressly on the ground that the doctrine of *Rylands* v. *Fletcher* "was inapplicable to a company which was doing what it was "authorized to do by Act of Parliament. That case is not to be "extended beyond the legitimate principle on which the House "of Lords decided it. If it were extended as far as strict logic "might require, it would be a very oppressive decision. Here "the defendant company were only doing what they were authorized to do by their Act, and as they were not guilty of negligence they are not liable for damage." That case, as appears from the judgment of Mathew J. in the court below, proceeded on the footing that, as the company were under a statutory duty to maintain a continuous supply of water, it was an inevitable consequence that there would be occasional bursts in the pipe and consequential damage.

That case was distinguished by Lord Sumner, sitting in the Court of Appeal, in *Charing Cross Electric Supply Co.* v. *Hydraulic Power Co.*,[67] a case I have already mentioned, where he held that the defendant company, who had statutory powers to supply water under pressure for industrial purposes, was liable on the principle of *Rylands* v. *Fletcher*. Lord Sumner said this[68]: "Another argument is based upon the language of the "defendants' Acts of Parliament. The Act of 1871 incorporated "the undertakers and recited that they proposed to carry on an "undertaking that was beneficial to the public. They are not "incorporated as waterworks supply companies with an obligation "to supply water to the public, but they are given powers of "taking water and of laying mains without being under obligation "to keep their mains charged with water at high pressure, or at "all. This serves at once to distinguish the class of cases of "which *Green* v. *Chelsea Waterworks Co.*[69] was an illustration, "where the principle is that if the legislature has directed and "required the undertaker to do that which caused the damage, "his liability must rest upon negligence in his way of doing it, "and not upon the act itself. In the Act of 1871 there was no "clause in pari materia with clause 17 of the Act of 1884 which

---

[66] (1872) L.R. 8 Q.B. 42.
[67] [1914] 3 K.B. 772.
[68] Ibid. 781.
[69] 70 L.T. 547.

"is: 'Nothing in this Act shall exempt the company from any "'indictment, suit, action, or other proceeding at law or in "'equity in respect of any nuisance caused by them.'" In the circumstances, it seems to me that the judgment of Lindley L.J. in the *Chelsea Waterworks* case [70] stated the law in terms which were too wide. It was really a case where the inevitable result of carrying out the statutory duty would result in damage from time to time and so by necessary implication the statute excused the company from liability where there was no negligence upon the principle exemplified in *Metropolitan Asylum District Managers* v. *Hill.*[71]

I turn, then, to the relevant statutory provisions applicable to this case. It has not been, and obviously could not be, suggested that the statutory duty to construct and maintain sewers leads inevitably to flooding, through overloading the sewer, which began some 35 years later. The whole question turns upon section 31 of the Public Health Act, 1936, which is in these terms: "A local "authority shall so discharge their functions under the foregoing "provisions of this Part of this Act as not to create a nuisance." That section necessarily implies, in my judgment, that, provided the defendant corporation does not "create a nuisance" in carrying out its duties, it is to be absolved from liability.

What, then, does the section mean by "not to create a "nuisance"? So far as this court is concerned, it must be taken as settled that the proper construction to be given to the section is to exclude liability for escapes in the absence of negligence and, therefore, to negative the rule in *Rylands* v. *Fletcher*; see *Hammond* v. *Vestry of St. Pancras*,[72] to which I have already referred, and *Stretton's Derby Brewery Co.'s* case,[73] where Romer J. had to consider section 19 of the Public Health Act, 1875. Section 19 was in these terms: "Every local "authority shall cause the sewers belonging to them to be con"structed, covered, ventilated, and kept so as not to be a nuisance "or injurious to health, and to be properly cleansed and emptied." Romer J. said this [74]: "Now section 19, on which the plaintiffs "rely, is in point of wording unlimited as to the liability it casts "upon the defendants. But it has long since been held—and I "take it to be now settled—that by reasonable construction of an "Act such as this the liability in circumstances like the present,

---

[70] 70 L.T. 547.
[71] (1881) 6 App.Cas. 193.
[72] L.R. 9 C.P. 316.
[73] [1894] 1 Ch. 431.
[74] Ibid. 442.

1954

SMEATON v. ILFORD CORPORATION.

Upjohn J.

"though in form not limited, is in fact limited to cases where the "public authority has been guilty of negligence, or, as it "is sometimes expressed, of want of reasonable care and "diligence."

It seems, too, that in the *Pride of Derby* case,[75] each member of the court construed the word "nuisance" in section 109 of the Derby Corporation Act, 1901, in the sense that I have used "liability in nuisance" in this judgment, though they were not directly concerned with escape, and the point which I have to consider was not directly before them. The Act of 1936 seems to me clearly to absolve the defendant corporation from liability for the escape of sewage complained of. It is, therefore, unnecessary to express a concluded view on the question whether a local authority exercising statutory duties is altogether outside the rule in *Rylands* v. *Fletcher*, as suggested by Denning L.J., or whether, on the other hand, it is prima facie liable on the principle of *Rylands* v. *Fletcher*, subject only to express or implied statutory modification as tentatively suggested by Sir Raymond Evershed M.R., in the respective passages I have already quoted from their judgments in the *Pride of Derby* case.[76] The distinction may be important in some cases, though in most it will not be, for the question will turn on the construction of the relevant statute.

In this rough sea of contradictory authority, an appeal, however tentative, to general principle is not out of place. The House of Lords has approved Lord Blackburn's statement that an individual has an absolute responsibility for an escape of filth from his land, and I can see no justification for applying a different law to a local authority merely because it is a local authority, or that it is carrying out something beneficial to the community, or even that it is doing so pursuant to a statutory duty. However, if in imposing a statutory duty upon a local authority, the legislature thinks fit to relieve that authority, by express provision or necessary implication, from the liability to which it would be otherwise subject, that is quite a different matter, and it may well be right to construe the relevant statutory provision in a manner generous to the authority upon whom the statutory duty is imposed.

However, be that right or wrong, as I have found that, upon the true construction of section 31, the defendant corporation are not liable for escape and the plaintiff has failed to establish liability in nuisance, the action necessarily fails, and I dismiss it with costs. The plaintiff is legally aided and I assess his contribution at nil.

---

[75] [1953] Ch. 149.

[76] Ibid.

Judgment for the defendants.

Solicitors: *Wylie Patterson & Herring; K. F. B. Nicholls, Town Clerk, Ilford.*

F. R. D.

BONSOR *v.* MUSICIANS' UNION.

[1951 B. 4779.]

C. A.

1954
Feb. 15, 16;
Mar. 5.

Evershed M.R., Denning and Jenkins L.JJ.

Trade Union—Whether legal entity—Action against union by member—Expulsion of member—Rules of union—Construction—Right of expulsion by committee of union—Expulsion by secretary ultra vires—Claim for damages—Nature of contract between trade union and members—Whether trade union a legal entity vis-à-vis members—Whether trade union officials agents of members—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 82 (1).

Practice and Procedure—Death of party—Effect—Death of appellant after hearing and before judgment given. Court of Appeal—Abatement of appeal. Damages.

The secretary of a branch of a trade union of musicians purported to exclude from membership of the union a member who was in arrears with his subscriptions by deleting his name from the list of members. Subsequently he declined to re-admit the member unless he first paid the arrears. The member claimed that the exclusion was wrongful and invalid, and that he was entitled to damages for the loss sustained as a result of the exclusion. By the rules of the union, "Any member . . . 26 weeks' subscription "in arrears shall be excluded unless a satisfactory reason be "assigned":—

Held, (1) that on the true construction of the rules of the union, the power of expelling a member was vested in the branch committee of the union and could not be delegated. The secretary, in attempting to expel the plaintiff, had, therefore, acted ultra vires.

Per Denning L.J. The rules of the union, though theoretically constituting a contract between the member and the union, lacked the essential feature of agreement freely made between the parties without any constraint. This union was a "closed shop." The rules were in the nature of a legislative code imposed on the members, and any rule which was contrary to what was fair and reasonable was invalid.

Held, (2) (*per* Evershed M.R. and Jenkins L.J.; Denning L.J. dissenting), that the claim for damages could not succeed, for the tortious act was committed by the plaintiff's own agent, since the secretary of the union was acting on behalf of all the members, including the plaintiff himself. He was none the less their agent, although the act complained of and done in the professed performance of his duties was tortious.

In suing "the union," the plaintiff was suing the individual members, including himself (though the contract constituted by the rules of the union was between the plaintiff and the members of the union excluding himself). The union, vis-à-vis its own members, had no separate legal entity.

Kelly v. *National Society of Operative Printers and Assistants* (1915) 113 L.T. 1055; 84 L.J.K.B. 2236; 31 T.L.R. 632 applied.

National Union of General and Municipal Workers v. *Gillian* [1946] K.B. 81; [1945] 2 All E.R. 593; 62 T.L.R. 46, *Amalgamated Society of Carpenters, Cabinet Makers and Joiners* v. *Braithwaite, General Union of Operative Carpenters and Joiners* v. *Ashley* [1922] 2 A.C. 440; 38 T.L.R. 879 and *Taff Vale Railway* v. *Amalgamated Society of Railway Servants* [1901] A.C. 426; 17 T.L.R. 698 distinguished.

Per Denning L.J., dissenting. A registered trade union is a legal entity capable of entering into contracts not only with outsiders but also with its own members. The contract of a member is between him and the union, not a contract between him and his fellow members; and that being so, it follows in point of law that if a member is wrongfully excluded by the union or by its officers in breach of the contract, he has a remedy in damages against the union. *Kelly's* case (supra) was based on four assumptions which subsequent decisions of the Court of Appeal and House of Lords have shown to be fallacious, and that was sufficient to entitle the court to disregard the case.

Decision of Upjohn J. affirmed.

Appeal from Upjohn J.

The plaintiff, H. Bonsor, who had been for many years a member of the Musicians' Union, failed to pay subscriptions from June, 1948, so that by the end of June, 1949, his subscriptions were 52 weeks in arrears. On July 2, 1949, the secretary of the branch at which the plaintiff had been registered, one Barton, struck the name of the plaintiff off the register of members and thereby excluded, or purported to exclude, the plaintiff from membership. The question of the plaintiff's exclusion was not considered nor resolved upon by any branch committee or meeting. The plaintiff was not notified, either before or after the purported expulsion, that he had been struck off the list of members until he applied to the union for sanction to accept a contract at Coventry. He was then informed that he could not play as a member of the orchestra at Coventry because he was no longer a member of the union. The secretary refused to allow him to pay the arrears of subscription out of his first receipts of salary at Coventry, and so he was obliged to decline the contract; and thereafter was unable to work as a professional musician. He brought proceedings against the union, alleging that he had been expelled wrongfully and he claimed damages. Upjohn J. decided that the expulsion was ultra vires, but that the plaintiff was not entitled to damages.

The defendant union appealed on the first issue, and the plaintiff cross-appealed against the refusal of the judge to award damages.

The relevant rules of the union are set out in the judgment of Evershed M.R.

L. B. Schapiro for the Musicians' Union, on the first issue. The plaintiff admitted that he knew that if he did not pay his subscriptions, or give some satisfactory reason for not doing so, he could be expelled from the union. His complaint is merely as to the way in which that expulsion was carried out, and because the secretary refused to give him credit in paying off arrears; but neither of these complaints is sufficient to entitle him to succeed, for the secretary's actions were not wrongful. The secretary was not acting beyond his powers in expelling the plaintiff, for the expulsion was an administrative, not a judicial act, the doing of which, as the practice of the union over a number of years showed, had been delegated to him. The secretary was responsible for getting in the subscriptions, and the plaintiff, by his failure to notify the change of address, made it impossible for the secretary to communicate with him and to notify him of the intention to exclude him from the union. It would, in fact, have made no difference to him if his case had been considered by the branch committee, for their decision could not have been notified to him. He cannot complain of the alleged harshness of the secretary's action, since he has not taken advantage of his right under rules of the union to appeal to a branch committee.

Further, if a reason for non-payment of subscriptions was given, rule 27 provides that the reason must be considered by the branch committee; but if no reason is given, there is nothing for the branch committee to consider, and the secretary in such circumstances may delete the name, the expulsion being merely an administrative act. If the rule contravened by the plaintiff had been some special and unexpected requirement of which the plaintiff might have been unaware, it is conceded that that rule would have to be construed strictly and contra proferentem, especially as this union was a closed shop. The member

C. A.
1954

BONSOR
v.
MUSICIANS'
UNION.

was sui juris and rule 27 was an obvious requirement. If a member failed to comply with steps which would have enabled the union to keep in touch with him, he cannot afterwards complain that the union has not acted in accordance with the principles of natural justice in failing to notify him: see *James* v. *Institute of Chartered Accountants.*[1]

Harry Lester, for the plaintiff, was not called on.

Feb. 15. EVERSHED M.R., giving judgment on the appeal: The sole question on the appeal is, as Mr. Schapiro has conceded, the construction of the rules of the union, on the footing that they constitute the terms of a contract between the plaintiff and the union, or members of the union. The particular rule which falls for consideration is rule 27 (7), which provides: "Any member "not clear on the books at the end of each quarter shall be fined "3d., and any member 26 weeks' subscription in arrears shall be "excluded unless a satisfactory reason be assigned."

[His Lordship stated the facts and continued:] The vital word in that sub-rule is "excluded." Upjohn J. came to the conclusion on the construction of the rules that there was no distinction between "exclude" and "expel," the word used in other parts of the rules; and no question on that matter has arisen here.

Rule 27 bears the heading, "Offences, fines and penalties," and the sixteen sub-rules provide what is to happen to a member who, in one or other of the ways specified in the various sub-rules, renders himself liable to a penalty. Those sub-rules, which provide alternative penalties, make it plain that the decision as to which penalty is to be imposed rests with the branch committee, or some other body ranking, so to speak, higher than the branch committee, for example, the executive committee. Thus under sub-rule (1) a man may, for the offence there mentioned, be fined, suspended or expelled. Other examples might be cited. But there is also a number of cases in which, given a particular course of conduct, one particular penalty is appropriate, and sub-rule (7) is one of that number. If a member is 26 weeks in arrear with his subscription, the penalty is not fine or suspension, but exclusion, or expulsion, which is the same thing.

Mr. Schapiro conceded that the last few words of the sub-rule "unless a satisfactory reason be assigned" must mean unless a reason is assigned which the branch committee should think satisfactory. The inevitable result of that view seems to me to be that the act of expulsion is, prima facie at least, an act of the branch committee. I think that it would be straining the meaning of the sub-rule and reading a great deal into it, if the effect of the rule was held to be that a member who was 26 weeks or more in arrears would, or might be, expelled by the secretary if he did not give a reason at all, but by the branch committee if he gave a reason, which reason the branch committee should think unsatisfactory.

---

[1] (1907) 98 L.T. 225; 24 T.L.R. 27.

That is not, by any means, all: I can understand that where the offence committed is failure to pay subscriptions for a long period of time, the rules might have provided that, at the end of the period chosen, the member should cease ipso facto to enjoy the rights of membership. But if that is what the rules intended they should have said so in clear terms or have had a context which required that meaning. In any case, Mr. Schapiro does not now contend that sub-rule (7) could mean an ipso facto determination of membership, for the simple reason that the final words I have already read, " unless a satisfactory reason be " assigned," make such a view impossible.

I have already said that there are some cases where the offence may justify an alternative penalty, and the branch committee, or in appropriate cases the higher body, is the body which decides the question. No mention is made anywhere in the rules of a power to expel in express terms being conferred upon an officer, such as the branch secretary. Under these other sub-rules in which no alternative penalty is provided, the rules are silent as to who should impose the penalty and how it is to be imposed.

In those circumstances I have thought it of assistance to refer back to rule 6. That rule deals with the duties, composition and so forth of the branch committees, and rule 6 (7) makes it clear that in the case of conduct detrimental to the interests of the union, non-professional conduct and so on, it is the committee which has the power to fine, suspend or expel. That leads me to think that the body in whom it might be expected that these very severe powers of expulsion would be vested would be the branch committee. It would be a strange result if in some cases, and as I think in the vast majority of cases, the branch committee would be the body expelling, but in others, and the rules do not say so in terms anywhere, such a power should be vested in the secretary. The matter is carried further still by rule 6 (5), for that sub-rule provides: " They " (that is to say,

C. A.
1954

Bonsor
v.
Musicians'
Union.

Evershed M.R.

the branch committee) "shall be a committee for general purposes, and shall determine, subject to appeal, anything wherein "the rules of the union are silent." On this particular matter the rules are silent, and it seems to me that there is no reason why rule 6 (5) should not fill the gap; it fills it, as I have already explained, in conformity with the general tenor of the rest of the document. As my brother Jenkins pointed out during the argument, it would be anomalous, to say the least, if the secretary was to have the deciding voice in a case of this kind. He is, according to rule 14, which describes his office and his duties, a minister or officer of the branch, and as regards subscriptions, it is his duty to keep a proper account of which subscriptions are paid and which are not paid. Therefore, if it rests upon him to expel under rule 27 (7), he is, so to speak, a judge in his own cause, for he is, by striking a member off the register for being 26 weeks in arrears, in effect thereby asserting the correctness of his own account.

The strongest point on the construction of the rules in favour of the other view is found in rule 29, dealing with appeals; subrule (1) provides: "If any member shall be aggrieved at any "fine, suspension or expulsion imposed under these rules other "than under any rule where such fine, suspension or expulsion "is imposed by a branch committee, or shall have any complaint "against any officer, officers, member or members he shall be "entitled to appeal to the committee of the branch of which he "is a member."

By the opening words, at first sight it certainly looks as though there might be an expulsion under the rules otherwise than by the branch committee and, in particular, by the branch secretary or other officer. But I am not satisfied that that consideration is anything like strong enough to outweigh what I regard as the inevitable inferences from the other rule already noticed. Provision is made, where fines are exigible in the case of arrears for relatively short periods, for the branch secretary to collect them; or so I construe the relevant sub-rule of rule 27. There is also provision in another of the sub-rules that a man, though not being expelled from the union, may be expelled from a meeting by the president of that meeting. I cannot think, therefore, that it is essential to find somewhere in the rules a power to expel a member from the union vested in an officer, such as a branch secretary, by reason of the opening words of rule 29 (1). I think that that rule is wholly insufficient to outweigh the other considerations which seem to me conclusive in the other direction.

Mr. Schapiro also submitted that, by whomsoever expulsion was made, there was a right of appeal and the plaintiff did not take advantage of it. It is true that he did not appeal, but I cannot see how that affects his right to come to this court and say that the branch secretary's purported expulsion was ultra vires the rules, and wholly ineffective. I do not, therefore, propose to take up further time on that matter.

The real point in the case, that of construction, was dealt with at length by Upjohn J., and I have only given such grounds as I have already stated, out of respect to the argument which has been put before us; but to my mind the judge was clearly right on this matter, and the appeal ought to be dismissed.

Denning L.J. On this appeal our task is to construe the rules of the Musicians' Union which constitute the contract between the member and the union; but in approaching this question of construction I desire to say that these rules are more a contract in theory than a contract in fact. In order for there to be a true contract, there must be the agreement of parties freely made with full knowledge and without any feeling of constraint. That was not so here. The Musicians' Union was a "closed shop." In order that a person should be allowed to work at his trade he had to sign a document agreeing to the rules. He had no option but to sign. The plaintiff himself said: "I did not want to be a member of it. I would like to tell his "Lordship that if I could earn my living forthwith without being "a member of this so-called Musicians' Union I would not want "to join it, but I have got to join it in order to work, because it "is a closed shop." He went on to say: "If I am readmitted "I will always pay my subscriptions, but I will not take any "active part in union matters. I will be a member by force, "because I am forced to be a member."

When one remembers that the rules are applied to a man in that state of mind, it will be appreciated that they are not so much a contract, as we used to understand a contract, but they are much more a legislative code laid down by some members of the union to be imposed on all members of the union. They are more like by-laws than a contract. In these circumstances the rules are to be construed not only against the makers of them, but, further, if it should be found that any of those rules are contrary to natural justice, or what comes to the same thing,

C. A.
1954

Bonsor
v.
Musicians'
Union.

Denning L.J.

contrary to what is fair and reasonable, the court would hold them to be invalid: see *Lee* v. *Showmen's Guild of Great Britain*[2] and *Kruse* v. *Johnson.*[3]

I approach this case, therefore, on the footing that the court should always interpret the rules, if it can, in such a way that they are fair and reasonable and, therefore, valid; rather than that they are contrary to natural justice and, therefore, invalid. On this footing I agree entirely with all that the Master of the Rolls has said about rule 27 (7). The committee are the only people who are empowered to say whether a reason is satisfactory or not. Sub-rule (7) means, therefore, that a member who is 26 weeks in arrear " shall be excluded " by the committee " unless " a satisfactory reason be assigned." If the committee are to decide the question of exclusion when a reason is assigned, they must also decide it when no reason is assigned. Mr. Schapiro suggested that the exclusion was an administrative act; not a judicial act; and, being administrative, he submitted that it could be delegated to the secretary. But he had to admit that a man could not be excluded without notice being given to him. That shows that it is a judicial act, and it cannot be delegated by the committee to the secretary. The secretary had no right to exclude the plaintiff, any more than the port officer had a right to expel a man in *Barnard* v. *National Dock Labour Board.*[4] I agree, therefore, with the Master of the Rolls that the secretary had no authority to exclude the plaintiff, and that this appeal should be dismissed.

Jenkins L.J. I agree and have nothing to add.

Appeal dismissed.

Argument was then heard on the cross-appeal.

H. Lester for the plaintiff. Upjohn J. said that he was precluded by *Kelly* v. *National Society of Operative Printers and Assistants*[1] from awarding damages to the plaintiff for wrongful expulsion. The ratio decidendi of *Kelly*'s case[1] was that the contract contained in the rules was between the proposed member and the union, that is, the aggregate of members including the proposed member himself. *Kelly's* case[1] is, however, in conflict

---

[2] [1952] 2 Q.B. 329; [1952] 1 T.L.R. 1115; [1952] 1 All E.R. 1175.

[3] [1898] 2 Q.B. 91, 99; 14 T.L.R. 416.

[4] [1953] 2 Q.B. 18, 40.

[1] 113 L.T. 1055; 84 L.J.K.B. 2236; 31 T.L.R. 632.

(see the comments of Scrutton L.J. in *Rex* v. *Cheshire County Court Judge & United Society of Boilermakers; ex parte Malone* [2]) with *Osborne* v. *Amalgamated Society of Railway Servants*,[3] which was approved by the House of Lords in *Amalgamated Society of Carpenters, Cabinet Makers and Joiners* v. *Braithwaite, General Union of Operative Carpenters and Joiners* v. *Ashley*.[4] In *Braithwaite's* case the relationship between a trade union and a member of the union was considered, and it was held that a member wrongfully expelled from a union could sue the union in contract. *Kelly's* case [5] was not referred to in *Braithwaite's* case.[6] It is submitted that *Kelly's'* case [7] was wrongly decided and that the contract contained in the rules was made between the member and every other member of the union, excluding the new member himself. [Reference was also made to *Lee* v. *Showmen's Guild of Great Britain*.[8]] In *Rigby* v. *Connol* [9] Jessel M.R. dismissed a claim on grounds which made it unnecessary to refer to the question of damages; that case was subsequently overruled.[10]

By the Trade Unions Act, 1871, trade unions were legalized and, except in so far as prohibited by section 4, a trade union could sue and be sued and damages could be awarded against the trade union. The present type of action is not within section 4 because the plaintiff is not seeking to enforce the agreement but is claiming damages for the breach. Even in *Kelly's* case [11] it was held that section 4 did not bar the action, though the claim was dismissed, it is submitted wrongly, on other grounds. The basis for *Kelly's* case [11] was as Scrutton L.J. said in *Rex* v. *Cheshire County Court Judge & United Society of Boilermakers; ex parte Malone*,[12] that the member, in suing the union, was suing himself, but even if that had been a correct decision it is now no longer a bar to a claim for damages by the plaintiff in view of section 82 (1) of the Law of Property Act, 1925, and damages can now be recovered out of the funds of the union. In *Braithwaite's* case [13] a declaration and an injunction was awarded against the union, but if it had been correct to say that a member in suing the union was suing himself that would also have been a clear answer to his claim for an injunction in *Braithwaite's* case.[13]

---

[2] [1921] 2 K.B. 694, 709.

[3] [1911] 1 Ch. 540; 27 T.L.R. 289.

[4] [1922] 2 A.C. 440; 38 T.L.R. 879.

[5] 113 L.T. 1055.

[6] [1922] 2 A.C. 440

[7] 113 L.T. 1055.

[8] [1952] 2 Q.B. 329; [1952] 1 T.L.R. 1115; [1952] 1 All E.R. 1175.

[9] (1880) 14 Ch.D. 482.

[10] [1922] 2 A.C. 440, 449.

[11] 113 L.T. 1055.

[12] [1921] 2 K.B. 694, 709.

[13] [1922] 2 A.C. 440.

[DENNING L.J. After *Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants*[14] a third party could get damages against a union and there seems to be no reason why a member of the union should be in a less favourable position.]

In the *Taff Vale* case[14] no distinction was drawn between a third party and a member of the union, and it seems to have been assumed that the union could be sued in contract in a case to which section 4 of the Act of 1871 did not apply. In *Yorkshire Miners Association* v. *Howden*[15] the House of Lords granted an injunction to a member of a union against the union, and that would seem to be illogical if "the union" was really the aggregate of all the members including the plaintiff. A trade union seems to be half way between a limited company and a partnership; it is a creature of Parliament with an entity distinct from that of the sum total of the members, so that in suing the union the plaintiff is not suing himself.

[EVERSHED M.R. In *Braithwaite's* case[16] the House of Lords approved *Osborne's* case[17] only in so far as it was referring to section 4 of the Act of 1871, but it is not now contended that this claim is excluded by that provision.]

Nothing in *Braithwaite's* case[18] indicates that the House of Lords had any difficulty in finding that there was a right of action against the trade union. It is submitted that there is no difference for this purpose between a claim for an injunction where a breach of contract is threatened and a claim for damages where there has already been a breach. If there has been a breach of contract in the present case the question is, who committed it? If the committee, they must have acted for the plaintiff and others if *Kelly's* case[19] is right, but if so, it is curious that the court has granted an injunction in similar circumstances. [*Abbott* v. *Sullivan*[20] was referred to.]

L. B. Schapiro for the Musicians' Union. The secretary was acting on behalf of the plaintiff, having been appointed by him and all the other members to act for them. The plaintiff cannot, therefore, sue him. [Reference was made to *Wood* v. *Woad*.[21]] There is nothing illogical in holding that a member of a trade union cannot obtain damages against the union though he may be able to obtain an injunction. Damages would have to be awarded out of the funds of which the member is part owner, and the basis of *Kelly's* case [22] is that a man cannot be awarded damages against himself. A member may be able to obtain costs against a union, although these, too, would have to be paid out of the funds of the union, but costs are in the discretion of the court. It is submitted that when a new member joins the union and signs the rules, he contracts with the members then comprising the union, other than himself; *Kelly's* case [22] does not alter that; it does not decide that the contract is between the new member and all the other members who comprise the union including himself. *Kelly's* case [22] decides only that a man cannot recover damages against himself. Section 82 of the Law of Property Act, 1925, does not cover this case, for that provision only applies where a man has contracted with himself. Section 82 is primarily concerned with covenants in conveyances of land, and unless it can be said that the plaintiff contracted with himself when he joined the union, the section has no application and *Kelly's* case [22] is binding on this court. In *Rex* v. *Cheshire County Court Judge and United Society of Boilermakers; ex parte Malone* [23] Scrutton L.J. made observations as to the difficulty of reconciling *Kelly's* case [24] and *Osborne's* case,[25] but he did not say which decision he regarded as being correct, if there was a conflict. Further, his remarks were merely obiter, and the point had not even been argued. In any case he could not have had in mind the effect of section 82, for it had not then been enacted. Bankes L.J.,[26] where he cited from Lord Macnaghten in the *Taff Vale* case,[27] supports the defendant's submission here. [Reference was also made to *Duke of Bedford* v. *Ellis*,[28] *Abbott* v. *Sullivan*,[29] *Rigby* v. *Connol* [30] and *Braithwaite's* case.[31]]

---

[13] [1922] 2 A.C. 440.
[14] [1901] A.C. 426; 17 T.L.R. 698.
[15] [1905] A.C. 256; 21 T.L.R. 431.
[16] [1922] 2 A.C. 440.
[17] [1911] 1 Ch. 540.
[18] [1922] 2 A.C. 440.
[19] 113 L.T. 1055.
[20] [1952] 1 K.B. 189; [1952] 1 T.L.R. 113; [1952] 1 All E.R. 226.
[21] (1874) L.R. 9 Ex. 190.

Lester in reply. The defendants have not explained the inconsistency between allowing a claim for an injunction and refusing to admit a claim for damages. An injunction may be granted to restrain a breach of contract but, if the defendants are right, the plaintiff could not have succeeded in an action for breach of contract. After the *Taff Vale* case [32] a trade union is regarded as a body having all the attributes of an incorporated body, though it is not incorporated. If a trade union is a legal entity all the difficulties disappear. A trade union is in an anomalous position, but it is wrong to regard it merely as a name for an agglomeration of members. The plaintiff cannot sue the secretary for breach of the contract with the union, for the secretary is not a member of the union. It is unrealistic to say that the secretary was acting on behalf of the plaintiff as well as of all other members of the union when he excluded him from membership against his will.

---

[22] 113 L.T. 1055.
[23] [1921] 2 K.B. 694, 709.
[24] 113 L.T. 1055.
[25] [1911] 1 Ch. 540.
[26] 113 L.T. 1055, 1062.
[27] [1901] A.C. 426.
[28] [1901] A.C. 1; 17 T.L.R. 139.
[29] [1952] 1 K.B. 189.
[30] 14 Ch.D. 482.
[31] [1922] 2 A.C. 440.
[32] [1901] A.C. 426.

Cur. adv. vult.

March 5. The following judgments were read.

Evershed M.R. I have already given my reasons for upholding the judgment of Upjohn J. in so far as he declared that the plaintiff had been wrongfully excluded, or expelled, from the defendant union. It becomes, accordingly, now necessary to consider the plaintiff's cross-appeal against the rejection by the judge of his claim for damages.

In the court below the plaintiff, by his counsel, conceded that the case was covered by the decision in this court of *Kelly* v. *National Society of Operative Printers and Assistants.*[1] Upjohn J., therefore, rejected this part of the claim without giving any reasons of his own.

Since *Kelly's* case[1] was a decision of the Court of Appeal, prima facie, and having regard to the rule established in *Young* v. *Bristol Aeroplane Co. Ld.*,[2] it would be binding upon us, no less than upon Upjohn J. Mr. Lester has, however, adopted a somewhat bolder course before us. He has argued that *Kelly's* case[3] ought no longer to be regarded as binding in the Court of Appeal, and that we, being free to reject *Kelly's* case, should proceed to do so and decide the present question in the plaintiff's favour. Mr. Lester advanced two grounds for his submission, either of them sufficient, if made good, for his purpose according to the judgment in *Young* v. *Bristol Aeroplane Co. Ld.*,[4] namely, (1) that later pronouncements in the House of Lords are inconsistent with the reasoning on which the decision in *Kelly's* case[5] was based; and (2) that the legal basis for the decision in *Kelly's* case has been destroyed by statute—namely, by section 82 of the Law of Property Act, 1925.[6]

---

[1] (1915) 113 L.T. 1055; 84 L.J. K.B. 2236; 31 T.L.R. 632.

[2] [1944] K.B. 718; 60 T.L.R. 536; [1944] 2 All E.R. 293.

[3] 113 L.T. 1055.

[4] [1944] K.B. 718.

[5] 113 L.T. 1055.

I shall have occasion at a later stage, and for the purpose of considering Mr. Lester's second point, to examine carefully the rationes of the three judgments in *Kelly's* case.[7] For present purposes, particularly in relation to Mr. Lester's first point, it is sufficient to state that in *Kelly's* case (as in the present case) the plaintiff alleged that he had been expelled from his union wrongfully and in breach of the union's rules; and he claimed, accordingly, a declaration to that effect, an injunction to restrain the defendants, their officers, and so forth, from excluding him from membership, and also damages. The action was brought in the county court where the plaintiff was wholly successful, obtaining a declaration and an injunction as sought by him, and £68 damages. The defendants appealed to the Divisional Court, where the judges (Horridge and Rowlatt JJ.), being divided in opinion, the appeal was dismissed. The defendants appealed again to the Court of Appeal, which unanimously dismissed the appeal so far as it related to the declaration and the injunction, but discharged the award of damages, holding the plaintiff's claim in that respect to be incompetent.

It is Mr. Lester's contention that the speeches in the House of Lords in *Amalgamated Society of Carpenters, Cabinet Makers and Joiners* v. *Braithwaite, General Union of Operative Carpenters and Joiners* v. *Ashley*,[8] containing approval of the decision of the Court of Appeal in *Osborne* v. *Amalgamated Society of Railway Servants*,[9] by necessary implication disapproved *Kelly's* case,[10] particularly so much of the judgments of the Court of Appeal in the last-mentioned case as related to the plaintiff Kelly's claim for damages. I am unable to accept this argument.

In *Osborne's* case [11] the plaintiff, a member of the defendant union, sought rescission of a resolution purporting to expel him from membership on the ground that such resolution was ultra vires and otherwise wrongful, and he sought also an order for his reinstatement as a member of the union. The defendants, by way of preliminary objections in their defence, alleged, first, that they

---

[6] Law of Property Act, 1925, s. 82 (1): "Any covenant, whether express "or implied, or agreement entered into "by a person with himself and one "or more other persons shall be con"strued and be capable of being "enforced in like manner as if the "covenant or agreement had been "entered into with the other person "or persons alone."

[7] 113 L.T. 1055.

[8] [1922] 2 A.C. 440; 38 T.L.R. 879.

[9] [1911] 1 Ch. 540; 27 T.L.R. 289.

[10] 113 L.T. 1055.

[11] [1911] 1 Ch. 540.

C. A.

1954

BONSOR
v.
MUSICIANS'
UNION.

Evershed M.R.

were an unlawful association and, consequently, that the contract constituted by the rules was incapable of enforcement in a court of law; and secondly, that, in any event, the plaintiff's claim involved the enforcement of an agreement for the application of the funds of a union for providing benefits to members—an agreement expressly made unenforceable by section 4 of the Trade Union Act, 1871.[12]

Both these objections were rejected by the Court of Appeal. The point raised by the second objection was again directly raised in *Braithwaite's* case,[13] and was answered both in the Court of Appeal and in the House of Lords in the same sense as it had been answered in *Osborne's* case,[14] the decision in which was, accordingly, expressly approved by the House. (See, for example, the speech of Lord Atkinson.[15]) It is true that *Kelly's* case [16] was referred to in the course of the argument for the appellants,[17] but it is not clear to what precise matter the citation was directed. In my judgment, it is impossible to contend that the House, in rejecting the argument of the appellants, by implication disapproved the decision in *Kelly's* case [18] upon the claim for damages; for that claim and the reasons for the court's rejection of it were not involved in, or relevant to, the issues in *Braithwaite's* case.[19] *Kelly's* case [20] is nowhere referred to in any of the speeches in the House of Lords. The question, the decision of which in *Osborne's* case [21] was approved by the House of Lords in *Braithwaite's* case,[22] was whether a claim by a union member that his expulsion was ultra vires the rules of the union involved an attempted enforcement of an agreement of a kind specified in section 4 of the Trade Union Act, 1871. That question was not involved in any way in *Kelly's* case [23] or this court's decision in *Kelly's* case. Indeed, apart from the language of Scrutton L.J. in *Rex* v. *Cheshire County Court Judge and United Society of Boilermakers; ex parte Malone*,[24] I should have thought it reasonably clear that there was no conflict between *Osborne's* case [25] and *Kelly's* case.[26] In my judgment, therefore, Mr. Lester's first point cannot be sustained.

---

[12] Trade Union Act, 1871, s. 4: "Nothing in this Act shall enable "any court to entertain any legal pro- "ceeding instituted with the object "of directly enforcing or recovering "damages for the breach of any of "the following agreements, namely, "(1) Any agreement between mem- "bers of a trade union as such, con- "cerning the conditions on which any "members for the time being of such "trade union shall or shall not sell "their goods, transact business, em- "ploy, or be employed; (2) Any agree- "ment for the payment by any person "of any subscription or penalty to a "trade union; (3) Any agreement for "the application of the funds of a "trade union—(*a*) to provide benefits "to members; or (*b*) to furnish contri- "butions to any employer or workman "not a member of such trade union, "in consideration of such employer or "workman acting in conformity with "the rules or resolutions of such trade "union; or (*c*) to discharge any fine "imposed upon any person by sen- "tence of a court of justice; or (4) Any "agreement made between one trade "union and another; or (5) Any bond "to secure the performance of any of "the above-mentioned agreements."

[13] [1922] 2 A.C. 440.

[14] [1911] 1 Ch. 540.

[15] [1922] 2 A.C. 440, 463.

[16] 113 L.T. 1055.

[17] [1922] 2 A.C. 440, 445.

[18] 113 L.T. 1055.

[19] [1922] 2 A.C. 440.

[20] 113 L.T. 1055.

[21] [1911] 1 Ch. 540.

[22] [1922] 2 A.C. 440.

I turn to Mr. Lester's second point based on section 82 (1), of the Law of Property Act, 1925. That section is in the following terms (so far as material): "Any . . . agreement entered into "by a person with himself and one or more other persons shall "be construed and be capable of being enforced in like manner "as if the . . . agreement had been entered into with the other "person or persons alone." The section was enacted to get over the kind of difficulty which sometimes arose on transfers of mortgages by trustees to new and continuing trustees. It would, to my mind, be surprising if a section contained in what may fairly be called conveyancing legislation had the oblique effect of altering at a stroke the rights of members of registered trade unions to recover damages from their unions for breaches of the union rules. Still, if such is the effect of the enactment fairly construed, so it is.

In order to invoke the section it is essential for Mr. Lester to establish that the ratio decidendi in *Kelly's* case [26] was that the contract constituted by the rules of the union was a contract between each member and the union, that is, the whole aggregate of the members including himself; and also that by seeking to enforce such contract he was suing all the members of the union, including himself.

In my judgment, Mr. Lester fails to make good the essential premise to his argument. In my judgment, the decision in *Kelly's* case [26] proceeded upon the view (expressed most clearly by Bankes L.J.[27]) that the material contract was a contract between the plaintiff Kelly and all the other members of the union except himself. And if the union is not itself a "persona juridica" distinct from the members who in the aggregate constitute the union, as the members of this court in *Kelly's* case [28] clearly thought it was not (a matter to which I shall have later to return), this view seems inevitable. When a new member joins "the union" he

---

[23] 113 L.T. 1055.
[24] [1921] 2 K.B. 694, 709.
[25] [1911] 1 Ch. 540.
[26] 113 L.T. 1055.
[27] Ibid. 1062.
[28] 113 L.T. 1055.

C. A.
1954

Bonsor
v.
Musicians'
Union.

Evershed M.R.

is, ex hypothesi, not already a member. He contracts (on the basis stated) with all the other members, and he and each of them remains contractually bound to each other under, and in accordance with, the rules during their respective memberships. But the court further proceeded upon the view that the committee, of whose acts the plaintiff had complained, were, under the constitution of the union, as much the plaintiff's agents as the agents of the other members, or (as Bankes L.J. observed [29]) if they did not act as such agents, then the plaintiff had no complaint against the union at all. Further, whatever was the nature of the contract, by suing "the union" the plaintiff was suing all the members, including himself; a class of action for which there was no warrant in authority. So in the present case the plaintiff by suing the union (unless the union is a persona juridica) is suing all the members of the union, including himself. I set out the material passages from the judgments, and I do so more fully than might otherwise have been necessary by reason of their bearing upon the general matter later dealt with in this judgment.

Swinfen Eady L.J. said [30]: "I am not aware of any authority "for the proposition that a member of a voluntary unincorporated "association can recover general damages against the association "as such, for a breach of the rules, or of the contract contained "in the rules. The committee of the society is the agent of "all the members of the society, but one member cannot recover "from the other members damages for the acts of the committee."

Phillimore L.J. said [31]: "With whom did the plaintiff contract? Not, I think, with the trade union, which, as Lord "Macnaghten says in *Russell* v. *Amalgamated Society of Carpenters and Joiners*,[32] is merely an unincorporated society of "individuals. I think that the plaintiff contracted with each and "every of the members, and if anybody has broken any contract "with him, it is each and every member. Further, the officers "of the society are agents for him quite as much as for the other "members. And if he sues the trade union for what it has done, "he is suing himself among others."

Finally, Bankes L.J. said [33]: "I can find no case in which a "claim like the present has ever been made, and it is necessary, "therefore, to consider it on principle. A trade union is in a "peculiar position. Lord Halsbury, in *Amalgamated Society of*

---

[29] 113 L.T. 1062.

[30] Ibid. 1058.

[31] Ibid. 1060.

[32] [1912] A.C. 421, 429; 28 T.L.R. 276.

[33] 113 L.T. 1055, 1062.

"*Railway Servants* v. *Osborne*,[34] speaks of it as a legalized "combination. Lord Macnaghten in *Taff Vale Railway Co.* v. "*Amalgamated Society of Railway Servants*,[35] points out that "a trade union, whether registered or unregistered, may be sued "in a representative action if the persons selected as defendants "be persons who from their position may be taken fairly to "represent the body, and later[36] he says that the registered "name of a trade union is nothing more than a collective name "for all the members. An action, therefore, against a trade "union may be regarded as in its nature a representative action "in which all the members are sued in their collective name. "It was decided in the *Taff Vale* case[37] that in such an action "the funds of a trade union could be made liable for a wrong "done to some person outside the society by an authorized agent "of the society, but, as Farwell J. points out,[38] the question in "that case was not a question of the rights of members of the "society, but of the wrong done to persons outside the society. "Here the question is as to the right of a member of the "society, and, to succeed in his claim for damages, the plaintiff "must establish, first, the contract for breach of which he sues, "and secondly, a breach either by the other party to the contract or by some duly authorized agent of that party. Here "the contract relied on is that contained in the rules. These "rules do, in my opinion, constitute a contract as between the "plaintiff and the other members of his trade union. The "plaintiff's case is that this contract has been broken, not by all "the other members personally, but by the London committee "of the executive committee acting as the agents of those other "members. It is here, I think, that the plaintiff fails. It is true "that both these bodies were appointed by the general body of "members, and as such they are the agents of the members, but "they are just as much the agents of the plaintiff as the agents "of his fellow-members whom he seeks to make liable under "their collective name. Further than this, the very ground on "which the plaintiff succeeds in obtaining an injunction is fatal "to his claim for damages. He succeeds in that claim because "he has established that the London committee and the executive "committee in expelling him from the society acted without "authority and in defiance of the rules. Having established that "fact, it is not possible to contend that they were at the same

---

[34] [1911] 1 Ch. 540.

[35] [1901] A.C. 426, 438.

[36] Ibid. 439.

[37] [1901] A.C. 426.

[38] Ibid. 431.

"time the authorized agents of his fellow-members to do the "acts which he complains of as constituting breaches of his "contract."

I have set out the whole of the relevant part of the judgment of Bankes L.J., though it seems, following later decisions of the Court of Appeal (see, for example, *Hardie and Lane Ld.* v. *Chiltern* [39]) that the citation made by Bankes L.J. from Lord Macnaghten [40] in reference to a representative action went further than was necessary or justifiable. But, in my judgment, the validity of the reasoning of Bankes L.J. is not, thereby, affected. Nor do I think that any question of a "representative "action" is material to the problem which in the present case we have to decide.

I add that, in my judgment, the proposition (contained particularly in the judgment of Bankes L.J.) that a committee appointed under the rules of the union should be treated as the agents of all the members in performing the functions committed to it, is not (at least for present purposes) affected by the further proposition that the servant of an unincorporated body who commits a tortious act in professed performance of his duties, for example, by defaming a third party, cannot be assumed to be the agent of all the members of the society in so doing.

There is no doubt that *Kelly's* case [41] was observed upon somewhat critically in *Rex* v. *Cheshire County Court Judge and United Society of Boilermakers*; *ex parte Malone*,[42] and particularly by Scrutton L.J. in that case [43]; but it is equally clear that it was, nevertheless, regarded as binding authority in the Court of Appeal. No one has ever suggested that the decision was arrived at per incuriam. My brother Denning, whose strong dissent from my own conclusion I have had the advantage of reading in advance, is of opinion that the relevant question decided in *Kelly's* case [44] may not have been fully argued by counsel. I have carefully read the reports in the Law Times [44] and the Law Journal [45]; and though I think it possible that the point arose during the hearing in the Court of Appeal, and may even have been suggested by the Court of Appeal, I cannot conclude that the question of the essential character of a trade union for the purposes in suit was not properly debated in argument. There was no earlier decision, omitted from notice, in favour of the view that, for the purposes in question or otherwise, a union should be regarded as a distinct persona juridica, the opinions in the *Taff Vale* case [46] (which were referred to) clearly supporting, in my opinion (notwithstanding the language of Lord Brampton [47] later mentioned) the opposite result. As I have said, neither in *Malone's* case,[48] nor elsewhere has it been suggested that the decision in *Kelly's* case [49] was given per incuriam. Thus in *Malone's* case [50] Lord Sterndale M.R. said of *Kelly's* case [51]: "That was a decision of this court, which binds us till the House "of Lords reverses it, that such damage as was claimed here "cannot be recovered in law, because a member of a voluntary "society like this cannot sue the society for damages which he "alleges he has suffered by their action. I do not think it neces- "sary to go into the reasons which the court gave for its decision. "That is the law until the House of Lords alters it." (And see *per* Younger L.J.[52]) In *Malone's* case [53] it was, however, decided that a wrongly expelled member of a union claiming merely a declaration and an injunction in respect of his expulsion, but not claiming damages (and disabled from claiming damages because of the decision in *Kelly's* case [54]) could not sue in the county court, because by section 56 of the County Court Acts, 1888 (see now section 40 of the Act of 1934 [55]), the county court has no jurisdiction to grant such relief, save as ancillary to a claim for damages of an amount within the court's jurisdiction; notwithstanding that the claim was based upon, and followed precisely, the form of relief prayed in *Osborne's* case.[56] And the court observed that that point had never been taken, and had, therefore, never been considered in *Kelly's* case,[57] which, as above stated, had come also from the county court. It was, I think, in light of those considerations that Scrutton L.J. used the language which he did, and which (because Mr. Lester cited it as supporting his submission of the conflict between *Osborne's* case [58] and *Kelly's* case,[59] resolved, as he claimed, in the former's favour by the House of Lords) I set out at length [60]: "I am glad it is unnecessary

---

[39] [1928] 1 K.B. 663, 701; 43 T.L.R. 709.

[40] 113 L.T. 1055.

[41] Ibid.

[42] [1921] 2 K.B. 694.

[43] Ibid. 709.

[44] 113 L.T. 1055.

[45] 84 L.J.K.B. 2236.

---

[46] [1901] A.C. 426.
[47] Ibid. 442.
[48] [1921] 2 K.B. 694.
[49] 113 L.T. 1055.
[50] [1921] 2 K.B. 694, 702.
[51] 113 L.T. 1055.
[52] [1921] 2 K.B. 694, 712.
[53] [1921] 2 K.B. 694.
[54] 113 L.T. 1055.
[55] County Courts Act, 1934, s. 40 (as amended): "(1) A county court shall "have jurisdiction to hear and deter- "mine any action founded on contract "or on tort where the debt, demand "or damage claimed is not more than "one hundred pounds, whether on "balance of account or otherwise."
[56] [1911] 1 Ch. 540.
[57] 113 L.T. 1055.
[58] [1911] 1 Ch. 540.
[59] 113 L.T. 1055.
[60] [1921] 2 K.B. 694, 709.

"for us in this case to go into the question of the exact relation of *Kelly's* case [61] and *Osborne's* case.[62] I do not understand them. In *Kelly's* case [63] the court decided that a person in the position of the present plaintiff could not recover damages against a society of which he was a member, because he himself was a member of that unincorporated body, and you cannot, on a contract between yourself and yourself, recover damages against yourself. But the court in *Kelly's* case [63] did grant a declaration and injunction to the plaintiff against himself, without apparently seeing that there was any inconsistency. If they had considered this point we should have been bound by their decision, whatever the result of it was; but I cannot find any trace in the judgment that it occurred to anybody to consider the effect of that action having come from a county court, and the effect of the limited jurisdiction of the county court upon that point. In *Osborne's* case [64] a declaration and injunction in the High Court were granted to the plaintiff, who was a member of an unincorporated body which he sued, and I do not see that in that case the point taken in *Kelly's* case [65] about damages was considered by the court, that is whether a man can get damages or any other relief against himself or against a body by its trade name which includes himself. It may be that in some future stage of trade union litigation, which is likely to occupy the court for many years to come, that that important point may come up for consideration; and I only desire at present to guard myself from expressing any opinion one way or the other about it, except by saying that I do not at present understand the relation of *Kelly's* case [65] and *Osborne's* case [66] to each other."

With all respect to so great an authority as Scrutton L.J., I do not think (for reasons which I have already given) that this court's rejection of the claim for damages in *Kelly's* case [67] depended upon the view that the contract there sued upon was one between the plaintiff and himself; nor do I think that there is any necessary inconsistency between the right to a declaration and an injunction on the one hand, and the inability to recover damages on the other. As a matter of logic and sense, in an association such as a trade union, a member may be heard to claim against his fellows to have his view of the construction of

---

[61] 84 L.J.K.B. 2236.
[62] [1911] 1 Ch. 540.
[63] 113 L.T. 1055.
[64] [1911] 1 Ch. 540.
[65] 113 L.T. 1055.
[66] [1911] 1 Ch. 540.
[67] 113 L.T. 1055.

C. A.
1954

Bonsor
v.
Musicians'
Union.

Evershed M.R.

the rules pronounced upon, but may well not be able to claim damages from all, or any, of them as upon an implied obligation on the part of each to see that the rules are properly applied. And the injunction may fairly be regarded as ancillary to the declaration rather than as an alternative means of enforcing the implied obligation: see, for example, per Fletcher Moulton L.J. in *Osborne's* case.[68] In any case, there is nothing in the observations of Scrutton L.J.[69] which, in my judgment, casts any doubt upon the binding quality of *Kelly's* case [70] as an authority. The result, in my opinion, is that Mr. Lester has failed to make good either of the grounds on which he sought to establish that, within the principles laid down in *Young* v. *Bristol Aeroplane Co. Ld.*,[71] *Kelly's* case [72] should no longer be regarded as a binding authority in this court.

But Mr. Lester also argued more generally that the result of *Kelly's* case [72] was irrational and anomalous. He drew attention to the apparent conflict between the grant of an injunction on the one hand, and the refusal to award damages on the other—a point to which I have already alluded; and suggested by reference to certain passages in the *Taff Vale* case [73] that the whole conception of the union as a voluntary and unincorporated association of individuals, as a mere name or description of the aggregate of its members, was wrong; and that for such purposes as are here involved the union ought to be treated as, in some sense, an entity, a persona juridica, distinct from its members, with which, as such, the contract was made, and which also, as such, was liable in damages for any breach of the implied term of the contract of membership that a member would not be expelled from " the union " except in accordance with the rules.

In my judgment, the speeches of the House of Lords in the *Taff Vale* case [73] cannot be said to make good the proposition contended for, notwithstanding the express affirmation of the judgment of Farwell J. and the language of Lord Brampton [74]: " I think that a legal entity was created under the Trade Union " Act, 1871 . . . and that the legal entity so created, though not " perhaps in the strict sense a corporation, is nevertheless a " newly created corporate body created by statute distinct from " the unincorporated trade union, consisting of many thousands " of separate individuals, which no longer exists under any other

---

[68] [1911] 1 Ch. 540, 561.
[69] [1921] 2 K.B. 694, 709.
[70] 113 L.T. 1055.
[71] [1944] K.B. 718.
[72] 113 L.T. 1055.
[73] [1901] A.C. 426.
[74] Ibid. 442.

"name." The language of Lord Macnaghten is inconsistent with such view. He said [75]: "It is quite true that a registered trade "union is not a corporation, but it has a registered name and "a registered office. The registered name is nothing more than "a collective name for all the members. . . . A partnership firm "which is not a corporation, nor, I suppose, a legal entity, may "now be sued in the firm's name. And when I find that the Act "of Parliament actually provides for a registered trade union being "sued in certain cases for penalties by its registered name, as a "trade union . . . I can see nothing contrary to principle, or "contrary to the provisions of the Trade Union Acts, in holding "that a trade union may be sued by its registered name." Lord Lindley [76] and Lord Shand [77] were clearly of the same opinion (as I read their speeches) as Lord Macnaghten and, as will later appear, it does not seem to me, when the judgment of Farwell J.[78] is examined, that it pronounced at all clearly in favour of the view that a new persona juridica had, at any rate save for very limited purposes, been created. In any event, *Kelly's* case [79] was decided 10 years after the *Taff Vale* case [80] and in reliance upon it, and though it may be said to have been somewhat criticized, no one (as I have already more than once observed) has ever suggested that it was decided per incuriam. Having regard, however, to the nature of the general argument and the importance of the case, I have thought it right to examine the later cases, and particularly the case in this court of *National Union of General and Municipal Workers* v. *Gillian*,[81] and before Birkett J.[82] which, though mentioned in argument, was not referred to before us.

In *Gillian's* case the substantial point raised and answered affirmatively both by Birkett J.[82] and the Court of Appeal [83] was whether a registered trade union could bring an action in its registered name against a third party for tort; that is to say, for libel. The case was, therefore, in a sense, the counterpart of the *Taff Vale* case,[84] which was chiefly relied upon by Birkett J. in answering each of the three following questions affirmatively: (1) Whether a union could sue a third party in its registered name for a tort, as it could be sued for a tort by a third party, subject to the express limitations imposed by statute; (2) whether in

[75] [1901] A.C. 439.
[76] Ibid. 445.
[77] Ibid. 440.
[78] Ibid. 427.
[79] 113 L.T. 1055.
[80] [1901] A.C. 426.
[81] [1946] K.B. 81; [1945] 2 All E.R. 593; 62 T.L.R. 46.
[82] [1945] 2 All E.R. 593, 594.
[83] [1946] K.B. 81.
[84] [1901] A.C. 426.

such an action the union could sue for the damage suffered generally, not being, in effect, limited in its claim to the purposes specified in the trade union Acts; and (3) whether, for the purposes of founding the claim in defamation, the union had a distinct "character" as such which was capable of being defamed.

Since in the Court of Appeal Scott L.J.,[85] at the beginning of his judgment stated that he so completely agreed with the judgment of Birkett J.[86] that he would have been content to adopt it as his own, it is useful and necessary to examine the grounds of that judge's judgment as well as those given in the Court of Appeal. I have said that, in my judgment, the House of Lords (or the majority of the House) in the *Taff Vale* case[87] did not base their conclusion on the ground that the union had in the eye of the law an entity distinct from the members who composed it. Moreover, it is not clear to me that the question raised in *Gillian's* case[88] might not have been decided as it was (and as the converse question had been decided in the *Taff Vale* case[89]) without assigning such a separate entity to the union (and there is authority for the view, at least by way of analogy, that one kind of unincorporated body, namely, a partnership firm, may sue for libel in the firm name). (See Lindley on Partnership, 10th ed., pp. 351 and 352, and cases there cited.) Still, there is no doubt that Birkett J. did arrive at the conclusion, and based his judgment on the ground, that a union registered under the Acts was endowed with a personality of its own. Birkett J. thus stated his conclusion[90]: "The 1871 Act, in my opinion, "designedly created registered trade unions for the first time, "and designedly created a new entity in law, a new *persona*, and "I think it must follow that that new entity is in the same "position as any other creature of the legislature. It must be "taken to possess all the rights which belong to a natural person, "so long as they are not inconsistent with the position of a "corporation, and, if not expressly withheld, the registered trade "union is given all the rights, I think, of a natural person, "and it can sue in its registered name for defamation when the "defamation touches its corporate or its collective reputation, "as I hold that this alleged libel does."

Birkett J., in the course of his reserved judgment, referred at length to all the relevant authorities, including passages in well-known textbooks, of which I quote as an example the following citation from Spencer Bower on Actionable Defamation (1908), p. 2, footnote (*l*): " It is believed that an examination of " all the authorities collected in the treatises on corporations will " justify the statement in the text, and that any body of persons, " possessing the marks therein enumerated, viz., (i) continuous " identity, (ii) a corporate or collective name, and (iii) an " expressly conferred, or not expressly withheld, capacity to sue " and be sued in such name, or an expressly conferred capacity " to sue and be sued in the name of any officer, is, for purposes " of actions of tort, and therefore of defamation, in the same " position as a natural person, whether it be in strictness a " corporation, or what (in the earlier decisions) is called a quasi-" corporate body, or a corporation by prescription, custom, or " implication only."

---

[85] [1946] K.B. 81, 84.
[86] [1945] 2 All E.R. 593, 594.
[87] [1901] A.C. 426.
[88] [1946] K.B. 81.
[89] [1901] A.C. 426.
[90] [1945] 2 All E.R. 593, 602.

The foundation for the view that a trade union has such a separate personality in the eye of the law is, I think, the judgment of Farwell J. in the *Taff Vale* case,[91] which was undoubtedly given express approval in the House of Lords. Farwell J. said[92]: " Now it is undoubtedly true that a trade " union is neither a corporation, nor an individual, nor a partner-" ship between a number of individuals; but this does not by " any means conclude the case." After referring to certain parts of the trade union Acts, 1871 and 1876, the judge proceeded[93]: " The Acts commence by legalizing the usual trade union con-" tracts, and proceed to establish a registry of trade unions, give " to each trade union the exclusive right to the name in which " it is registered, authorize it through the medium of trustees to " own a limited amount of real estate, and unlimited personal " estate ' for the use and benefit of such trade union and the " ' members thereof '; provide that it shall have officers and " treasurers, and render them liable to account; require that " annual returns be made to the registry of the assets and " liabilities and receipts and expenditure of the society; provide " that it shall have rules and a registered office, imposing a " penalty on the trade union for non-compliance; and permit it " to amalgamate with other trade unions and to be wound up."

Finally, Farwell J. stated[94]: " Now, the legislature in giving " a trade union the capacity to own property and the capacity to " act by agents, has, without incorporating it, given it two of the " essential qualities of a corporation—essential, I mean, in respect

---

[91] [1901] A.C. 426.
[92] Ibid. 427.
[93] Ibid. 427.
[94] Ibid. 430.

"of liability for tort, for a corporation can only act by its agents, "and can only be made to pay by means of its property." This last passage, however, followed a statement emphasizing the point that the action was not an action of contract, but an action in tort; and he said[95]: "It is not a question of the rights of "members of the society, but of the wrong done to persons outside "the society."

Founding himself, then, on these passages, approved as they were in the House of Lords, and on the speeches in the House in the same case, Birkett J. reached the conclusion which I have already cited. But it is to be noted that he did not purport to define the full or precise nature of the quasi-corporate capacity with which he held a union to be endowed, still less did he hold that in its relations with its own members the union should be treated as being a separate legal entity contracting as such.

It is, however, certainly true that Scott L.J. (at least) in the Court of Appeal, went further in the course of his judgment; for, after deciding that a union was a distinct persona juridica created by statute, and basing that conclusion on substantially the same references to the Acts as had been indicated by Farwell J. in the *Taff Vale* case,[96] he proceeded[97]: "In my view, the true inter-"pretation of the Acts is that a trade union is given all powers of "a persona juridica except (*a*) those solely characteristic of a "natural person, and (*b*) those which are expressly excepted by "the creating or enabling statute." MacKinnon L.J. delivered no separate judgment of his own.

Uthwatt J. stated his conclusion in his opening paragraph as follows[98]: "I agree. The point decided in *Taff Vale Railway Co.* "v. *Amalgamated Society of Railway Servants*,[99] was that a "registered trade union might properly be named as a defendant "to an action. That decision involves, to my mind, that a "registered trade union is recognized by the law as a body "distinct from the individuals who from time to time compose it. "It is not a corporation; but it is very much like one. The "association is not merely the aggregate of the persons who com-"pose it, and the presence of the corporate fiction is not necessary "to secure its individuality. In an age of neologism it might be "called a 'near-corporation.'"

It will be observed that neither in the court below, nor in the

---

[95] [1901] A.C. 431.
[96] Ibid. 427.
[97] [1946] K.B. 81, 86.
[98] Ibid. 87.
[99] [1901] A.C. 426.

C. A.

1954

Bonsor
v.
Musicians'
Union.

Evershed M.R.

Court of Appeal, was there any consideration of the position of a trade union, vis-à-vis its own members, and, therefore, *Kelly's* case [1] (though, prima facie, binding on the Court of Appeal) was never referred to from first to last.

It is not open to doubt that *Gillian's* case [2] is binding on this court no less than is *Kelly's* case [3]; and if there is a direct conflict between the two cases, then this court, I apprehend, can, and must, decide which to follow. In such event it would become necessary to go back to the Acts themselves. And, so doing, although I, of course, concede the right and power of Parliament to create an entity not previously known to the law, I confess, for my part, to the strong impression that Parliament did not intend to confer a distinct entity upon a registered trade union, and that the provisions for vesting "union" property in trustees, relied upon specifically for the contrary view, tend rather to be inconsistent with it. But though the general language used by the judges in the two cases presents, undoubtedly, an apparent inconsistency, there is not, in my judgment, the necessary conflict of decision. *Kelly's* case [4] was concerned with the relations between an individual member of a union and the union itself. It held that there was no authority for an action for damages by a member of a union for breach of the union rules, and directly decided the point now in issue. *Gillian's* case [5] was concerned with the relations between a registered trade union and third parties, strangers to it.

In my judgment, therefore, later cases, and particularly *Gillian's* case,[5] do not entitle us to regard, or justify us in regarding, in conformity with the principles properly applicable, *Kelly's* case [6] as otherwise than binding upon us in the present appeal. And if this be said to be taking too narrow a view of the law, then I answer, first, that, narrow or not, if such is the law, we must apply it. I answer, further, that if Parliament has chosen in its wisdom to bring into being (as we must, according to *Gillian's* case,[7] hold that it has) a creature hitherto unknown to the law, a "near-corporation," having not all but some, and unspecified, attributes and characteristics of a corporation, then anomalies and difficulties appear to be inevitable; and the qualities and habits of this statutory, and amorphous, being must be discerned as it is given body and clothing by judicial decisions, which

[1] 113 L.T. 1055.

[2] [1946] K.B. 81.

[3] 113 L.T. 1055.

[4] Ibid.

[5] [1946] K.B. 81.

[6] 113 L.T. 1055.

[7] [1946] K.B. 81.

may sensibly decide that it presents (legally) a different aspect in its dealings with outside persons from that displayed to its members in relation to its internal affairs.

It is, no doubt, true that a union, by acting irresponsibly towards one of its members, may most seriously and harshly affect his whole livelihood; though I observe that in this context "a union" really means the officers who conduct and manage its affairs, and who may—theoretically at least—be removed from office at any time by the members. It is also true that in the present case (according to the facts as found by Upjohn J.) the present unhappy train of litigation and the loss by the plaintiff of his professional career appear to owe their origin entirely to an almost elementary lack of forbearance on the part of one official. This may well, therefore, be a hard case; though, in fairness to the union, I must add that we do not know what has passed between the parties since the judgment of Upjohn J., and that up to that date (at least) I am not myself so far satisfied, in any case, that the plaintiff could make good a substantial claim for damages. But if, whenever a member of a union alleges some breach of the rules by some officer, or committee, or meeting, and alleges that he has thereby suffered some loss, he may successfully sue "the "union" for damages and, even if he cannot execute against all the individual members throughout the length and breadth of the country, can, by some appropriate process, execute against the union's property, though vested in trustees not parties to the action, the result would not (I should have thought) of necessity be universally regarded as beneficial. In other words, if my view of the proper answer to this appeal is correct, I do not feel qualified to say whether there is left a mischief which ought to be remedied. On the other hand, if the contrary view prevails, the members of a registered trade union would appear to have obtained, somewhat by a side wind, an advantageous position vis-à-vis their union not enjoyed by members of other voluntary associations. I note, finally, that in *Kelly's* case [8] it was said by Swinfen Eady L.J. and by Bankes L.J. that no similar claim for damages had previously come before the court. And I am not aware of any attempt, since, to revive such a claim until the present action. These matters go, however, beyond the functions of this court in this appeal. I refer to them only for their relevance to the argument that a decision of the present appeal in accordance with *Kelly's* case [8] would involve some logical absurdity, or would be contrary to common sense or some established legal principle.

---

[8] 113 L.T. 1055.

For the reasons which I have given, I have come to the conclusion that the cross-appeal must fail and be dismissed; but I have reached my conclusion with the less confidence, having regard to the judgment of Denning L.J., to which I have earlier alluded. The law cannot, it is clear, be regarded as satisfactorily settled, and I express the serious hope that, having regard to the highly significant position occupied today by trade unions, and the importance to them and their members of the subject involved in this case, an opportunity may be found for a review of the present authorities by the House of Lords.

Denning L.J. This case well illustrates the great powers wielded by trade unions at the present day. This union, the Musicians' Union, has the power to dictate both to employers and to workmen. It has in this case excluded the plaintiff from the occupation as a musician in which he has spent his life, and which is the only occupation he knows; and all because he fell into arrears with his subscriptions. It is, indeed, a grievous punishment to inflict upon him. He was reduced at one time to accepting employment to remove rust from a Brighton pier. At the time of the trial he was only getting £6 a week in an engineering works, whereas previously, earning his livelihood as a musician, he was earning well over £10 a week. This exclusion has lasted for four years, and his loss of earnings must be very considerable, to say nothing of the worry and trouble to which he has been put. And the exclusion was unlawful. It was done unlawfully by the secretary of the Brighton branch, who had no right to do it. When the plaintiff tried to get reinstated, the secretary showed him no sympathy, but insisted on payment of all fines and arrears forthwith. It was only £4, but the plaintiff simply could not find the money at once, and the secretary would not let him pay out of his first week's wages. So he was excluded from his profession. The judge says that "the blame must be "laid fairly and squarely upon the shoulders of the secretary, "whose behaviour does him no credit." We have already held that this exclusion was a breach of contract. Yet it is said that we cannot award the plaintiff damages for the injury done to him. If this be so, then it is a grievous thing; for I know of no other case where the law allows a party to break a contract with impunity. A man's right to work is just as important to him, indeed more important, than his right of property. If he is unlawfully deprived of his right to work, the courts should intervene to protect him. They have always protected him against wrongful dismissal by his employer. They should also protect him against wrongful exclusion by his union.

There is only one decision which stands in the way of an award of damages. It is *Kelly* v. *National Society of Operative Printers and Assistants.*[9] A careful reading of that case shows that it is based on the proposition that a trade union is only an unincorporated association of individuals, without any legal personality of its own at all apart from its members. But that proposition is, I believe, a false proposition. A trade union is a legal entity with a personality in law comparable to that of a corporation. It is not, perhaps, an entire corporation, but it has many of the attributes of one. In particular it can make contracts and break them, just as a corporation can; and it is liable in damages for breach of contract, just as a corporation is; save for certain exemptions which Parliament has conferred upon a trade union, none of which avail the Musicians' Union in the present case.

Let me first show, however, that a trade union is a legal entity. And I start by observing that as simple matter of fact, not law, a trade union has a personality of its own distinct from its members. Professor Dicey pointed that out long ago. He said: " When a body of twenty, or two thousand, or two hundred " thousand men, bind themselves together to act in a particular " way for some common purpose, they create a body, which by " no fiction of law, but by the very nature of things, differs from " the individuals of whom it is constituted " (17 Harvard Law Review, p. 513). And Professor Maitland expressed his wholehearted concurrence with unrivalled clarity and felicity in his Collected Papers, Vol. III, p. 305. He quotes the incident in the House of Commons in 1904 when the Prime Minister, Mr. Balfour, spoke of trade unions as corporations. Sir Robert Reid (afterwards Lord Loreburn) interrupted him with " The trade " unions are not corporations." " I know that," retorted Mr. Balfour, " I am talking English, not law." I take it to be clear, therefore, that a trade union is an entity in fact. The question is whether it is also an entity in law.

When trade unions were first legalized 83 years ago, their supporters were very anxious that they should not be made corporations, because they wanted to avoid the liabilities which flowed from corporate personality. They desired that a trade union should be able to prosecute an officer or servant who embezzled its funds; but they did not want a trade union to be sued by its members or by outsiders. But when the statutes came to be enacted it was found that this was not a possible state of affairs. The trade unions had, perforce, to be given a legal personality; and one cannot have the benefits of legal personality without the responsibilities attaching to it.

---

[9] 113 L.T. 1055.

To prove this, take the statutes from 1871 to 1940, and one will find that Parliament has conferred on a registered trade union so many rights and duties, and such ample powers and capacities, as to make it a legal entity virtually indistinguishable from a corporation: (i) a registered trade union has the capacity to own property and to act by agents. (The Act of 1871 passim); (ii) it can itself make complaints and lodge indictments in the criminal courts (section 12 of the Act of 1871); and it is itself liable to penalties in the criminal courts for non-compliance with statutory provisions (for example, sections 15 and 16 of the Act of 1871); (iii) it has "its constitution" and "its objects" (sections 1 and 2 of the Act of 1913), and cannot do anything outside them; (iv) it is capable of entering into contracts with third persons and with its own members. It is true that Parliament has provided that certain of its contracts are not "directly "enforceable" by action (section 4 of the Act of 1871); but that leaves all the rest of its contracts enforceable; (v) it can undertake "engagements" on its own account and become indebted to its own "creditors"; and it can by special resolution transfer "its engagements" to any other trade union without prejudice, however, to the rights of its own creditors (section 6 of the Societies Act, 1940). In view of this catalogue of enactments from 1871 to 1940, there can, I think, be no doubt at the present day that a trade union is a legal entity.

Now take the decided cases, and one will find that they all support the same view. First of all comes the great *Taff Vale* case,[10] in which the House of Lords held that a trade union could be sued in tort for the wrongful conduct of its servants in the course of a strike. The majority of the House adopted as their own the judgment of Farwell J., who said[11]: "Now, although "a corporation and an individual or individuals may be the only "entity known to the common law who can sue or be sued, it "is competent to the legislature to give to an association of "individuals which is neither a corporation nor a partnership

---

[10] [1901] A.C. 426.

[11] Ibid. 429.

"nor an individual, a *capacity for owning property and acting by* "*agents*, and such capacity in the absence of express enactment "to the contrary involves the necessary correlative of *liability* "*to the extent of such property for the acts and defaults of such* "*agents*. It is beside the mark to say of such an association "that it is unknown to the common law. The legislature has "legalized *it*, and *it* must be dealt with by the courts according "to the intention of the legislature." Note how he personifies it, treating it as something distinct from the individuals; and treating it also as responsible for the acts of its servants. Lord Halsbury L.C. did the same. He said [12]. "If the legislature "has created a thing which can own property, which can employ "servants, and which can inflict injury, it must be taken, I "think, to have impliedly given the power to make it suable in "a court of law for injuries purposely done by authority and "procurement"; and Lord Brampton said distinctly [13] that this thing so created by Parliament was "a legal entity . . . "though not perhaps in the strict sense a corporation."

It is interesting to notice that, after the proceedings in the House of Lords (which were of an interlocutory nature), the case went for trial, and a verdict was found for the plaintiffs against the trade union. The damages were assessed at £23,000, and that sum was paid out of the funds of the trade union. (See the report of the Royal Commission presided over by Lord Dunedin, which reported on January 15, 1906 [Cd. 2825, p. 3].)

The next step towards personifying a trade union was taken in *Amalgamated Society of Railway Servants* v. *Osborne*,[14] where the House of Lords held that a registered trade union had no power to levy a political contribution from its members. The doctrine of ultra vires was there applied fairly and squarely to a trade union, just as much as to a corporation. Lord Halsbury said, indeed, that [15] "the Act is, as it were, the charter "of incorporation"; and Lord Atkinson said [16] that trade unions "are, when registered, quasi-corporations, resembling much more "closely railway companies incorporated by statute than voluntary "associations of individuals merely bound together by contract or "agreement, express or implied."

Another milestone was the decision in *Braithwaite's* case,[17] where the House of Lords held that a member who has been wrongfully expelled from his union can sue the trade union in contract. He can sue it for a declaration as to his rights under the contract, and for an injunction to prevent the union from expelling him in breach of the contract, and he can recover costs against the union. This decision carries with it this important implication: an action against a trade union is not the same as a representative action against all the members. It is an action against a separate legal person. If it were the same as a representative action, it would mean that the member was suing himself, which is not possible.

---

[12] [1901] A.C. 436.

[13] Ibid. 442.

[14] [1910] A.C. 87.

[15] Ibid. 92.

[16] Ibid. 102.

[17] [1922] 2 A.C. 440.

Finally, there is the decision of this court in *Gillian's* case,[18] where it was held that a trade union can sue for a libel on itself. A libel is, of course, in its very nature, a wrong to the person, not a wrong to property; and it is apparent that it is only by attributing legal personality to a trade union that it can be permitted to sue for a libel on itself. At first instance Birkett J. in a valuable judgment said[19] "The 1871 Act . . . designedly "created a new entity in law, a new *persona*, and I think it must "follow that that new entity is in the same position as any other "creature of the legislature." In the Court of Appeal Scott L.J. said[20] that he agreed so completely with the judgment of Birkett J. that he would have been content to adopt it as his own. Uthwatt J. put the position quite simply and directly when he said[21] that "a registered trade union is recognized by "the law as a body distinct from the individuals who from time "to time compose it." Note how close those words are to those of Professor Dicey. The entity in fact is now recognized as an entity in law. Uthwatt J. was at pains to add, as if in deliberate contradiction to what Lord Macnaghten had said in the *Taff Vale* case,[22] "the association is not merely the aggregate of "the persons who compose it." My conclusion, therefore, is that a registered trade union is a legal entity capable of entering into contracts not only with outsiders, but also with its own members.

Turn now to the contract of membership in the present case and see how naturally it fits into the conception of a legal entity. When the plaintiff joined the trade union he signed a printed document addressed to the secretary of the Kilburn branch of the Musicians' Union in these words: "I, the undersigned, do hereby "make application to become a member of the Musicians' Union,

[18] [1946] K.B. 81.
[19] [1945] 2 All E.R. 593, 602.
[20] [1946] K.B. 81, 84.
[21] Ibid. 88.
[22] [1901] A.C. 426, 440.

" subject to the constitution and rules which I accept as a con-" dition of my admission to membership. Declaration of new " members. I, the undersigned do hereby agree, of my own free " will and consent, to conform to and abide by the rules of this " union, as also any subsequent rules or alterations thereof that " may be made in accordance with the constitution of this union, " and I further declare my intention to promote to the best of " my ability, the interests of this union and to act in harmony " with my fellow members for the maintenance of the objects as " expressed in its rules."

The rules of the union read more like a legislative code than anything else, but the significant thing is that throughout the rules the union is treated as a legal person. In the face of these documents I ask myself: suppose the Musicians' Union were only an unincorporated association of individuals with no legal personality of its own, what is the contract evidenced by those documents? Is it a contract by each member with the others jointly, or with them separately? And is a new contract made every time an old member goes out and a new member comes in? And what are the terms of the contract? Every member, of course, promises to pay his subscriptions and obey the rules, but does he do more? Are the officials to be regarded as his agents, so that he is responsible for their wrongdoing or for their breaches of contract? No confident answer can be given to any of these questions.

But once it is held that a trade union is a legal entity, the nature of the contract by every in-coming member becomes clear. It is a contract between him and the union, not a contract between him and his fellow members; and it is a contract whereby he, for his part, agrees to abide by the rules of the union, and the union, for its part, impliedly agrees that he shall not be excluded by the union or its officers except in accordance with the rules. This view is supported by the statement in Mr. Citrine's book, Trade Union Law (1950), p. 175, when he says that the rules " constitute the contract existing between the members and the " union, upon the exact terms of which will depend the objects " and powers of the union and the rights and liabilities of both " contracting parties."

Once the contract of membership is held to be a contract between the member and the union, then it follows in point of law that if a member is wrongfully excluded by the union or its officers in breach of the contract, he has a remedy in damages against the union. The position of the trade union is then indistinguishable from the position of a proprietary club which has been held liable in damages for wrongful exclusion. (See *Baird* v. *Wells*[23]; *Young* v. *Ladies' Imperial Club*[24]; *Abbott* v. *Sullivan*.[25])

This brings me to the last question: Is this court bound by *Kelly's* case[26]? In that case Kelly was wrongfully expelled by the branch committee of a trade union. It was held by the Court of Appeal that he could obtain a declaration and an injunction against the trade union, but that he could not recover damages. No distinction had been taken in the courts below between the various remedies. Counsel for the trade union seems to have conceded that if Kelly was entitled to a declaration and an injunction he was also entitled to damages, subject only to the question of remoteness. It was in the Court of Appeal for the first time that it was suggested that the claim for damages was not sustainable; but the court, so far as I can see, did not have the benefit of an argument from counsel, or, at any rate, not of any full argument. Furthermore, the court proceeded upon four assumptions which later cases have shown to be wrong. (1) The court proceeded on the assumption that a registered trade union is not a legal entity, but only an unincorporated association of individuals. That assumption has now been shown to be wrong by *Gillian's* case.[27] (2) The court proceeded on the assumption that an action against the trade union may be regarded as in its nature a representative action against all the members. This assumption was based on some observations of Lord Macnaghten in the *Taff Vale* case[28]; but later cases have shown that Lord Macnaghten, for once, was in error. If it were truly the same as a representative action, it would mean that every single one of the members would be personally liable for a wrong committed by the officials, a view which has since been shown to be untenable. (See *London Association for Protection of Trade* v. *Greenlands Ld.*,[29] *per* Lord Parker, and *Hardie and Lane* v. *Chilton*,[30] *per* Sargant L.J. and *per* Lawrence L.J.[31]) (3) The court proceeded on the assumption that an action by a member against a trade union was an action against all the members, including himself; and he could not bring an action against himself. That assumption is inconsistent with the numerous cases where a member has been held entitled to sue his union for a declaration and an injunction and costs. That was pointed out by Scrutton L.J. in *Malone's* case.[32] (4) The court proceeded on the assumption that the committee of the trade union were the agents of all the members; and that, therefore, when the committee excluded Kelly, they were acting on behalf of everybody, including Kelly himself; and he could not complain of something done by his own agent. I cannot understand this line of reasoning. I cannot understand how it can be said that the committee, when they were excluding Kelly, were acting as agents on his behalf. They were acting against him, not for him. It has, indeed, since been held by the House of Lords that in the case of an unincorporated association of individuals, no agency is implied by the mere fact of association. (See *London Association for Protection of Trade* v. *Greenlands Ld.*,[33] *per* Lord Parker.) There was nothing else in *Kelly's* case [34] but the mere fact of association. The committee were not, therefore, the agents of Kelly, or, indeed, of the other members.

---

[23] (1890) 44 Ch.D. 661; 6 T.L.R. 229.

[24] [1920] 2 K.B. 523; 36 T.L.R. 392.

[25] [1952] 1 K.B. 189, 197, 203, 219; [1952] 1 T.L.R. 133; [1952] 1 All E.R. 226.

[26] 113 L.T. 1055.

[27] [1946] K.B. 81.

[28] [1901] A.C. 426, 438.

[29] [1916] 2 A.C. 15, 38; 32 T.L.R. 281.

[30] [1928] 1 K.B. 663, 699.

[31] Ibid. 701.

It seems to me, therefore, that *Kelly's* case [34] is based on four assumptions which were made without full argument, and which subsequent decisions of this court and of the House of Lords have shown to be fallacious. That is sufficient, I think, to entitle us to disregard the case.

Apart from *Kelly's* case,[34] there is only one further point that I need mention. It was said that the action of the secretary (in expelling the plaintiff) was unauthorized, and, therefore, a nullity. The court, indeed, has now declared that he is still a member. How can he sue then, it is said, for damages for exclusion from membership when he has in law been a member all the time? This argument bears no relation to the facts. The exclusion may have been a nullity in law, but it was far from being a nullity in fact. The plaintiff could not ignore it; nor could anyone else in the musical profession ignore it, neither employers nor workmen. It deprived him of his livelihood and caused him great damage. The trade union are liable for this damage done by the secretary, just as any corporation is liable for the breaches of its servants. It is no answer for them to say that the secretary was not authorized to commit the breach. They have put him in his place to do acts of this class, and they must be answerable for the way he conducts himself therein. The case is very different from *Wood* v. *Woad*,[35] where there was no damage in fact.

---

[32] [1921] 2 K.B. 694, 710.

[33] [1916] 2 A.C. 15, 38.

[34] 113 L.T. 1055.

In conclusion I would say that Parliament has legalized trade unions and has given them large immunities from the ordinary process of the law. It has exempted them from any liability for tort, and also from liability for certain contracts; but it has never exempted them from liability for wrongful exclusion of a member. Nowadays exclusion from membership means exclusion from his livelihood. No one in this country should be in law fully excluded from his livelihood without having redress for the damage thereby done to him. I would, therefore, allow the cross-appeal.

Jenkins L.J. The plaintiff having succeeded in his contention that his purported exclusion or expulsion from membership of the defendant union was null and void, and having been held to be entitled, accordingly, to the declaration and injunction granted by Upjohn J.'s order of April 17, 1953, there remains the question whether he is also entitled to recover damages against the defendant union on the ground that his purported exclusion or expulsion constituted a breach of his contract of membership.

This question was not argued before Upjohn J., as Mr. Lester, for the plaintiff, while formally reserving it for argument in the event of an appeal, conceded that the claim for damages could not be maintained in a court of first instance, in view of the decision of the Court of Appeal in *Kelly* v. *National Society of Operative Printers and Assistants.*[36]

Mr. Lester has argued on grounds, to which I will presently refer, that although *Kelly's* case[36] was a decision of this court, it is open to us here to overrule or decline to follow *Kelly's* case.[36] I cannot agree. The decision in *Kelly's* case was a unanimous decision of three Lords Justices in an appeal arising from an action brought in the county court by a member of a registered trade union against the union in its registered name for a declaration, an injunction and damages in respect of his purported, but wrongful and invalid, expulsion from membership of the union by a resolution of the committee of his branch. There is no distinction for the present purpose between invalid expulsion by a wrongful resolution of a branch committee and invalid exclusion or expulsion by the wrongful action of a branch secretary as in the instant case. The members of the court who heard the appeal in *Kelly's* case [36] thus had before them the very question which we are now invited to decide, and they held unanimously that the purported expulsion was invalid, but that while the plaintiff was entitled to the declaration and injunction claimed, and the decision of the county court judge and of the Divisional Court, whose members, being equally divided, had dismissed the defendant union's appeal, should to this extent be upheld, the award of damages to the plaintiff contained in the judgment of the county court should be discharged.

---

[35] (1874) L.R. 9 Ex. 190.

[36] 113 L.T. 1055.

In order to do justice to Mr. Lester's argument, the reasons given by the three Lords Justices for disallowing the claim to damages should be quoted at length. Swinfen Eady L.J. said [37]: "There remains the question of damages. The plaintiff has "obtained judgment for £68 damages upon the footing of a breach "of the contract contained in the rules of the society, and "although the form of the county court judgment is not quite "clear, I gather that the judgment for that sum is against the "society, and also against the trustees, although limited in the "latter case to the funds of the society. I am not aware of any "authority for the proposition that a member of a voluntary "unincorporated association can recover general damages against "the association as such, for a breach of the rules, or of the "contract contained in the rules. The committee of the society "is the agent of all the members of the society, but one member "cannot recover from the other members damages for the acts "of the committee. For these reasons I am of opinion that the "judgment of the Divisional Court must be varied, and so much "of the judgment of the county court as adjudged that the "defendants respectively should pay £68 damages be discharged."

Phillimore L.J. said [38]: "There remains the question of "damages. This matter was not discussed by Horridge J. as "he thought that the plaintiff failed. The learned county court "judge has taken it upon the evidence that the result of the "plaintiff's being expelled from the society is practically to "prevent him getting work at his trade as a newspaper printer "in London, and whereas before his expulsion he earned some "money as a part day porter, and could after his expulsion only "at the best make more money as a whole day porter, he has "given him the difference over the period before his restoration. "And Rowlatt J. has agreed with him. Damages for tort cannot "be given since the Trade Disputes Act, 1906. These damages

---

[36] 113 L.T. 1055.

[37] Ibid. 1058.

[38] Ibid. 1060, 1062.

" can only be supported as damages for breach of contract. With " whom did the plaintiff contract? Not, I think, with the trade " union, which, as Lord Macnaghten says in *Russell's* case,[39] " is merely an unincorporated society of individuals. I think " that the plaintiff contracted with each and every of the members, and if anybody has broken any contract with him it is " each and every member. Further, the officers of the society " are agents for him quite as much as for the other members. " And if he sues the trade union for what it has done, he is " suing himself among others. I am not sure whether according " to the very loose form in which the judgment is drawn up " there is any judgment against the trade union as such. But " if there is it is open to these objections. I also think that " there can be no charge upon the funds of the society for any " breach of contract nor any right to treat the trustees as " personally liable for breach of an agreement to which they were " not apparently parties and which they have not broken, even " with a limitation of their personal liability to the funds of the " society in their hands which is the way in which the judgment " against them is expressed. I think there may be a further " objection. What are these damages?" And after discussing the difficulty of determining what damages (if any) could be held to flow from the breach of the plaintiff's contract of membership on which the action was based, the Lord Justice continued: " It is enough, however, to rest the case on the " ground that I have already mentioned, and I think that the " judgment was wrong in awarding damages, and that the appeal " to that extent should succeed."

Bankes L.J., after pointing out that the claim must be regarded as a claim founded in contract " otherwise section 4 of the " Trades Disputes Act, 1906, would apply to it," continued[40]: " I can find no case in which a claim like the present has ever " been made, and it is necessary, therefore, to consider it on " principle. A trade union is in a peculiar position. Lord " Halsbury in *Amalgamated Society of Railway Servants* v. " *Osborne*[41] speaks of it as a legalized combination. Lord " Macnaghten in the *Taff Vale* case,[42] points out that a trade " union, whether registered or unregistered, may be sued in a " representative action if the persons selected as defendants be " persons who from their position may be taken fairly to represent

---

[39] [1912] A.C. 421, 429.
[40] 113 L.T. 1055, 1062.
[41] [1910] A.C. 87, 93.
[42] [1901] A.C. 426, 438.

"the body, and later,[43] he says that the registered name of a "trade union is nothing more than a collective name for all the "members. An action, therefore, against a trade union may be "regarded as in its nature a representative action in which all "the members are sued in their collective name. It was decided "in the *Taff Vale* case[44] that in such an action the funds of a "trade union could be made liable for a wrong done to some "person outside the society by an authorized agent of the society, "but, as Farwell J. points out,[45] the question in that case was "not a question of the rights of members of the society, but of "the wrong done to persons outside the society. Here the "question is as to the right of a member of the society, and, to "succeed in his claim for damages, the plaintiff must establish, "first, the contract for the breach of which he sues, and secondly, "a breach either by the other party to the contract or by some "duly authorized agent of that party. Here the contract relied "on is that contained in the rules. These rules do, in my opinion, "constitute a contract as between the plaintiff and the other "members of his trade union. The plaintiff's case is that this "contract has been broken, not by all the other members "personally but by the London committee and the executive "committee acting as the agents of those other members. It is "here, I think, that the plaintiff fails. It is true that both these "bodies were appointed by the general body of members, and "as such they are the agents of the members, but they are just "as much the agents of the plaintiff as the agents of his fellow-"members whom he seeks to make liable under their collective "name. Further than this, the very ground on which the plain-"tiff succeeds in obtaining an injunction is fatal to his claim for "damages. He succeeds in that claim because he has established "that the London committee and the executive committee in "expelling him from the society acted without authority and in "defiance of the rules. Having established that fact, it is not "possible to contend that they were at the same time the "authorized agents of his fellow-members to do the acts which "he complains of as constituting breaches of his contract."

It will be convenient next to refer to the case in this court of *Rex* v. *Cheshire County Court Judge and United Society of Boilermakers; ex parte Malone*,[46] upon which one of Mr. Lester's arguments was partly founded. That was a case where a member of a registered trade union brought an action in the county court for a declaration and an injunction in respect of an allegedly invalid resolution of the union for his expulsion, but without including any claim for damages. The county court judge held that he had no jurisdiction to entertain the action, because there was no claim for damages, and no damage could have been recovered in the action, having regard to *Kelly's* case[47]; and he refused an application by the plaintiff to amend by adding a claim for £88 damages. The Divisional Court granted the plaintiff a rule directing the county court judge to hear and determine the action, and the defendant union successfully appealed to this court. In the course of his judgment Lord Sterndale M.R., after dealing with the county court judge's refusal of leave to amend, and holding in effect that this was a decision to which he could properly come in the exercise of his discretion, continued thus[48]: "The learned county court judge, "at any rate, had a discretion to grant or refuse that application, "and he refused it. And he then said, in accordance with the "law as it now stands, that, even if the claim for £88 had been "made, it could not succeed because of the decision in *Kelly* v. "*National Society of Operative Printers and Assistants.*[49] That "was a decision of this court, which binds us till the House of "Lords reverses it, that such damage as was claimed here cannot "be recovered in law, because a member of a voluntary society "like this cannot sue the society for damages which he alleges "he has suffered by their action. I do not think it necessary to "go into the reasons which the court gave for its decision. "That is the law until the House of Lords alters it. Therefore "the learned county court judge said that, even if he had taken "that question of damages into account, there could have been "no recovery of any damages at all, and he held that he had no "jurisdiction to grant either the injunction or the declaration "which was asked for. I think he was right. I myself think—I "am prepared to go as far as this—that a claim for such a "declaration as this cannot be brought in the county court "without anything to limit the money result of it, so as to "disregard the limit of the jurisdiction of the county court "altogether."

---

[43] [1901] A.C. 439.
[44] [1901] A.C. 426.
[45] Ibid. 431.
[46] [1921] 2 K.B. 694.

Scrutton L.J., in the course of his judgment, said[50]: ". . . he" (that is, the plaintiff) "did not include any claim for "damages. He or his advisers deliberately, and as they thought "at the time with astuteness, did that because of a decision of

---

[47] 113 L.T. 1055.

[48] [1921] 2 K.B. 694, 702.

[49] 113 L.T. 1055.

[50] [1921] 2 K.B. 694, 705.

"the Court of Appeal, that such a person, a member of an "unincorporated trades union, could not recover damages against "the union, he himself being a member of the body which he "was suing, according to the ordinary principles of law that a "man cannot recover damages against himself, and for that "reason the plaintiff did not include a claim for damages in his "plaint in the county court. When the case came before the "county court judge it at once occurred to him that there was "a question whether, if there was no money claim, he could "have any jurisdiction. The plaintiff's counsel then asked leave "to amend by adding a claim for damages. The learned judge "refused the leave to amend on the ground that the application "was made too late, and that it affected the jurisdiction of the "court; and he, therefore, without expressing any opinion on the "merits, and assessing the damages at £88, if he had juris-"diction, gave judgment against the plaintiff on the ground that "he had no jurisdiction to entertain a claim for a declaration "and injunction when no money claim was made."; and[51]: "In this case there is no claim for money. There is intentionally "no claim for money. I do not take the view of the Divisional "Court that you make a claim for money when you ask to amend "the proceedings in which there is no claim for money by adding "such a claim. What you are doing is asking to introduce a "claim into a proceeding, and if that application is refused there "is no money claim in the proceeding, the proceeding remains "as it was before, without a money claim."

Then he made this comment[52] on *Kelly's* case[53]: "I am "glad it is unnecessary for us in this case to go into the question "of the exact relation of *Kelly's* case[53] and *Osborne's* case.[54] I "do not understand them. In *Kelly's* case[55] the court decided "that a person in the position of the present plaintiff could "not recover damages against a society of which he was "a member, because he himself was a member of that unincor-"porated body, and you cannot, on a contract between yourself "and yourself, recover damages against yourself. But the Court "in *Kelly's* case[55] did grant a declaration and injunction to the "plaintiff against himself, without apparently seeing that there "was any inconsistency. If they had considered this point we "should have been bound by their decision, whatever the result "of it was; but I cannot find any trace in the judgment that it

---

[51] [1921] 2 K.B. 707.

[52] Ibid. 709.

[53] 113 L.T. 1055.

[54] [1911] 1 Ch. 540.

[55] 113 L.T. 1055.

"occurred to anybody to consider the effect of that action having "come from a county court, and the effect of the limited jurisdiction of the county court upon that point. In *Osborne's* "case [56] a declaration and injunction in the High Court were "granted to the plaintiff, who was a member of an unincorporated body which he sued, and I do not see that in that case "the point taken in *Kelly's* case [57] about damages was considered "by the court, that is whether a man can get damages or any "other relief against himself or against a body by its trade name "which includes himself. It may be that in some future stage "of trade union litigation, which is likely to occupy the court "for many years to come, that that important point may come "up for consideration; and I only desire at present to guard "myself from expressing any opinion one way or the other about "it, except by saying that I do not at present understand the "relation of *Kelly's* case [57] and *Osborne's* case [58] to each other."

Younger L.J. in the course of his judgment said [59]: "Now "unfortunately for the plaintiff it has been decided by the Court "of Appeal in *Kelly's* case [60] that no court, neither a county "court, nor any other court, is entitled to award damages in "respect of such a claim brought by a member of a trade union "against his union. These are not damages cognizable by any "court at all as founding any legal claim to relief. Accordingly "until *Kelly's* case [60] is set aside, by some tribunal superior to "this, such a plaintiff as we have here must be in a position to "say that his action was within the jurisdiction of the county "court, although it was an action in respect of which no sum, "however small, could have been awarded to him by the judge, "however successful in his claim he might be. In other words, "the question that has to be determined on this appeal is this: "Whether so long as *Kelly's* case [60] stands unreversed a plaintiff, "a member of a trade union, is entitled to maintain an action "in the county court for the relief which the plaintiff in fact "obtained in *Osborne's* case [61]—that is to say, for a declaration "and an injunction followed by no award of any money "compensation."

Mr. Lester placed considerable reliance on Scrutton L.J.'s reference to the apparent inconsistency in holding, as in *Osborne's* case [61] and in *Kelly's* case [62] itself, that a declaration and an injunction could be granted in an action such as this, while at the same time holding that damages are not recoverable, seeing that the objection that the plaintiff is suing an unincorporated body of which he is himself a member, and, in that sense, suing himself, would appear to be equally applicable whichever form of relief is in question. From this Mr. Lester argued in effect that, apart from *Kelly's* case [63] recognition of the plaintiff's right to a declaration and an injunction in a case such as this necessarily involves recognition of his right to damages. But, his argument proceeded, the right of a wrongfully expelled member of a registered trade union to relief by way of injunction in an action against the union in its registered name has been recognized by the House of Lords since *Kelly's* case [63] in *Braithwaite's* case and *Ashley's* case,[64] and thereby (as the two things go together) the House of Lords has impliedly recognized the right of such a plaintiff to damages, and *Kelly's* case [63] can, therefore, no longer be regarded as authoritative. I cannot accept this argument. The short answer to it is that there was no claim to damages in *Braithwaite's* and *Ashley's* cases,[65] and the question whether damages, if claimed, would have been recoverable was, therefore, never considered by the House of Lords. In *Kelly's* case [66] this court clearly and categorically held that, while relief by way of a declaration and an injunction could be granted, no damages could be recovered. That decision is binding on us until it is held wrong by the House of Lords; and it clearly was not so held in *Braithwaite's* and *Ashley's* cases,[67] where there seems to have been no more than a passing reference in argument to *Kelly's* case,[68] with no indication that the decision in that case regarding the claim to damages was questioned or even considered. I would again refer to the passage already quoted from the judgment of Lord Sterndale M.R. in *Malone's* case,[69] in which he said of *Kelly's* case [70]: "That "was a decision of this court, which binds us till the House of "Lords reverses it, that such damage as was claimed here cannot "be recovered in law . . . I do not think it necessary to go into the "reasons which the court gave for its decision. That is the law "until the House of Lords alters it."

---

[56] [1911] 1 Ch. 540.
[57] 113 L.T. 1055.
[58] [1911] 1 Ch. 540.
[59] [1921] 2 K.B. 694, 711.
[60] 113 L.T. 1055.
[61] [1911] 1 Ch. 540.
[62] 113 L.T. 1055.

Mr. Lester further argued that since the decision in *Kelly's* case [70] the law had been materially altered by section 82 of the Law of Property Act, 1925, which had validated and rendered

---

[63] 113 L.T. 1055.
[64] [1922] 2 A.C. 440.
[65] [1922] 2 A.C. 440.
[66] 113 L.T. 1055.
[67] [1922] 2 A.C. 440.
[68] 113 L.T. 1055.
[69] [1921] 2 K.B. 694, 702.
[70] 113 L.T. 1055.

C. A.
1954

Bonsor v. Musicians' Union.

Jenkins L.J.

enforceable a covenant or agreement made by a party with himself and another or others by giving it effect as a covenant or agreement by such party with the opposite parties other than himself, and had thereby removed the objection raised in *Kelly's* case [70] to the effect that the aggrieved member was suing himself. I cannot follow this argument. It was not held in *Kelly's* case [70] that the aggrieved member's contract of membership was invalid as a contract with himself and others. The case proceeded on the footing that such contract was a contract between the plaintiff and the other members of the union, and the objection, or rather, one of the objections, which the court held fatal to the plaintiff's claim in damages was that the breach of contract alleged by the plaintiff against the other members was not a breach committed by them personally, but consisted of a wrongful act on the part of officers of the union for which the plaintiff sought to make the other members vicariously liable as for a breach of contract committed by their agents; but that as the offending officers were the agents of the plaintiff no less than of the other members, the plaintiff was claiming damages from the other members as vicariously liable for a breach of his contract of membership committed by persons who were his own agents just as much as theirs; and, consequently, that, in so far as he was seeking to make the other members liable in damages for the breach, he was suing in respect of a wrong done to himself by his own agents, or, in other words, for a wrong done vicariously by himself to himself. I think it was in this sense that Phillimore L.J. (alone of the three Lords Justices who decided *Kelly's* case [70]) referred to the plaintiff as [71] "suing himself amongst others," rather than in the narrow and technical sense that inasmuch as the registered name of the union in which it was sued comprised all its members, the plaintiff was, in point of form, on both sides of the record. Be that as it may, it is, in my opinion, clear that section 82 of the Law of Property Act, 1925, has nothing to do with the case.

I trust that in what I have said above I have fairly stated the arguments advanced by Mr. Lester in support of his contention that this court is no longer bound by *Kelly's* case [72] as distinct from his arguments as to the merits of that decision. I find nothing in the former which would justify us in holding that *Kelly's* case [72] is no longer binding upon this court, and it is, therefore, unnecessary for me to discuss the latter. But I may, perhaps, permit myself two observations on the merits of the decision in *Kelly's* case.[72]

---

[70] 113 L.T. 1055.

[71] Ibid. 1060.

[72] 113 L.T. 1055.

The first is that, given the premise that an action by a member of a registered trade union against the union in its registered name, for relief in respect of his wrongful exclusion or expulsion from the union in circumstances such as those of the present case, is an action against the members of the union (or the members of the union other than the plaintiff himself) based on breach of the contract of membership between themselves and the plaintiff, and not an action against the union as a distinct legal entity based on breach by that entity of a contract of membership between that entity and the plaintiff, the objections to allowing any claim to damages in an action so constituted are, to my mind, unanswerable.

The second is that, given the same premise, the alleged inconsistency in granting a declaration and an injunction while refusing damages, is by no means clear to me. In claiming a declaration and an injunction in a case such as this, the plaintiff member is in effect saying to his fellow members: " Our common " agent the secretary, duly appointed under the rules, has " without our authority and in breach of the rules purported to " exclude me from membership. I contend that such purported " exclusion is a nullity, and that if you treat and act upon it as " valid you will be committing a breach of the contract of " membership subsisting between us. Accordingly, I am apply" ing to the court for a declaration that my purported exclusion " is invalid and an injunction restraining you from acting upon " it, in order to protect my rights as a member." To succeed in that claim the plaintiff need not bring home to any individual member any actual breach of his contract of membership.

But in claiming damages against his fellow members in the like case the plaintiff is in effect saying to his fellow members: " Our common agent the secretary, duly appointed under the " rules, has, without our authority and in breach of the rules, " purported to exclude me from membership. I must admit that " you did not authorize this wrongful act any more than I did, " and that the offending secretary is my agent just as much as " yours; and it is, of course, the foundation of my case that my " purported exclusion by the secretary is a mere nullity. Never" theless, I claim damages from each and every one of you on the " ground that this wrongful and unauthorized act of the secretary " in itself constituted a breach by you as his principals of the " contract of membership subsisting between us." It seems to me that the difficulties with which the claim in damages, so stated, is fraught do not attend the claim for relief by way of declaration and injunction.

The result might well be different if it could be held that in such cases the wrongfully expelled member's contract of membership was a contract between the wrongfully expelled member and the union as a legal entity distinct from its members, and the action an action against that entity based on breach of that contract. But the decision to the contrary in *Kelly's* case [72] precludes us from so holding. Even if it was open to us so to hold, we could not do so without going the length of attributing full corporate status to a registered trade union, which, speaking for myself, I would hesitate to do.

I would add, in conclusion, that I have not overlooked the more recent case in this court of *National Union of General and Municipal Workers* v. *Gillian*,[73] to which we were not referred by counsel. The question in that case was whether a registered trade union could sue in its registered name for a libel upon the union as a body. In reaching an affirmative answer to that question Scott L.J. and Uthwatt J., with whom Mackinnon L.J. agreed without expressing any reasons of his own, used language which certainly came near to attributing to a registered trade union the full status of a corporate body. But this, like the *Taff Vale* case,[74] of which it was in effect the converse, was an action between the union and persons outside its membership, as distinct from an action by a member against the union in respect of an alleged invasion of his rights as a member. No doubt for that reason *Kelly's* case [75] was not cited, and the position in regard to actions of the latter class was not even considered. In view of *Kelly's* case,[75] it clearly would not have been open to the members of this court in *Gillian's* case [76] to hold that such an action was an action against the union as a corporate body distinct from its members, on a contract between that body and the member aggrieved. Accordingly, I cannot regard *Gillian's* case [76] as justifying a departure from the law as laid down in *Kelly's* case [77] in regard to actions of the kind with which we are here concerned.

The question whether a member of a trade union wrongfully excluded or expelled from membership should be enabled to claim damages against the union as a body might, perhaps, be thought worthy of consideration by the legislature. But as the law now stands, and must continue to stand unless and until it is altered by legislation, or one of these cases including a claim to damages at long last reaches the House of Lords, and their Lordships see fit to overrule *Kelly's* case,[77] I conceive that we have no option but to dismiss the plaintiff's cross-appeal on his claim to damages, notwithstanding that he has successfully repelled the defendant union's appeal in relation to the other relief claimed.

---

[72] 113 L.T. 1055.

[73] [1946] K.B. 81.

[74] [1901] A.C. 426.

[75] 113 L.T. 1055.

[76] [1946] K.B. 81.

[77] 113 L.T. 1055.

After judgment had been delivered in the cross-appeal, MR. LESTER stated that he understood that the plaintiff had died on March 4, 1954. EVERSHED M.R. said that if the court had been informed, as it should have been, judgments would not have been delivered, because the appeal had abated; there was at present no appellant before the court and the position would have to be regularized before any judgment or order could be drawn up.

On March 16, 1954, the matter was again before the court, and, after referring to *Turner* v. *London & South-Western Ry.*[78] and *Ecroyd* v. *Coulthard*,[79] an order was made, counsel for the Musician's Union not objecting, that judgment be entered for the union and be ante-dated to February 16, 1954.

Cross-appeal dismissed.

Solicitors: *Cecil Altman; Hall, Brydon, Egerton & Nicholas.*

E. D.

---

[77] 113 L.T. 1055.
[78] (1874) L.R. 17 Eq. 561.
[79] [1897] 2 Ch. 554, 573.

In re MITCHELL, DECD. HATTON *v.* JONES.

1954
Apr. 30.

Wynn-Parry J.

Will—Construction — Intestacy, as on — Residue to pass to persons entitled as on intestacy of testator's widow—Widow illegitimate—Right of Crown—Bona vacantia—Nature of Crown's entitlement to estates of persons dying intestate—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *s.* 46 (1).
Crown—Bona vacantia.

A testator bequeathed his residuary estate on trust for his wife for life, and thereafter on trust for such persons as she should by will or codicil appoint, and in default of such appointment on trust for "such person or persons who would have been entitled thereto "under Part IV of the Administration of Estates Act, 1925, at the "death of my said wife had she died possessed thereof intestate without having been married such persons to take in the shares and "manner in which they would have taken under the said Part of the "said Act."

The testator died in 1939, and the widow, who was illegitimate, died in 1949 without having exercised the power of appointment, leaving her mother surviving.

On the hearing of a summons taken out to ascertain whether the residuary estate passed to the widow's mother, or to the Crown, or to the persons interested as on the intestacy of the testator:—

Held, (1) that the estate fell to be distributed to the person or persons who would have been entitled if section 46 had been written out in full in the will, so that the widow's mother took no interest; (2) that the estate passed to the Crown, not by virtue of its prerogative rights to bona vacantia, but by virtue of the provisions of section 46 (1), which formed a complete and exhaustive code, so that the testator's next-of-kin could take no interest.

ADJOURNED SUMMONS.

By his will dated July 25, 1934, Sydney Gillott Mitchell, who died on December 19, 1939, directed that his trustees should hold his residuary estate on trust (in the event, which happened, of his leaving no issue him surviving) to pay the income to his wife during her life and after her death on trust to provide for certain annuities, and subject thereto, on trust for such persons as she should by will or codicil appoint, and in default of or subject to any such appointment "in trust for such person or "persons who would have been entitled thereto under Part IV "of the Administration of Estates Act, 1925,[1] at the death of "my said wife had she died possessed thereof intestate without "having been married such persons to take (and if more than "one) in the shares and manner in which they would have taken "under the said part of the said Act."

---

[1] Administration of Estates Act, 1925, s. 46 (1): "The residuary "estate of an intestate shall be distributed in the manner or be held "on the trusts mentioned in this "section, namely":—[Paragraphs (i) to (iv) provide for the method of distributing the residuary estate of an intestate if the intestate leaves (i) a husband or wife and (*a*) no issue; (*b*) issue; (ii) issue, but no husband or wife; (iii) no issue, but both parents; (iv) no issue, but one parent. Paragraph (v) directs how the estate is to be distributed among more remote relatives, if the intestate leaves no issue or parent.] "(vi) In default "of any person taking an absolute "interest under the foregoing provisions, the residuary estate of the "intestate shall belong to the Crown "or to the Duchy of Lancaster or to "the Duke of Cornwall for the time "being, as the case may be, as bona "vacantia, and in lieu of any right "to escheat. ... ."

The testator's widow died on May 14, 1949, intestate and without having exercised the power of appointment. On the evidence it appeared that her father was unknown and that she was illegitimate. Consequently, there appeared to be no person other than the Crown (it being conceded that the Crown was a "person" within the meaning of that word as used in section 46 of the Act) who would be entitled to the residue under the intestacy of the testator's wife.

A summons was taken out by the trustees of the will to determine whether the residuary estate ought to be held, as from the death of the widow and subject to the annuities, (a) on trust for the first defendant, the mother of the testator's widow; or (b) on trust for the Treasury Solicitor; or (c) whether it devolved as on the intestacy of the testator.

R. O. Wilberforce Q.C. for the plaintiffs.

The first defendant did not appear.

E. I. Goulding for the testator's next-of-kin. The material provision of the will must be read as if the whole of section 46 of the Administration of Estates Act, 1925, was set out in the clause. This section discloses a formula from which it becomes clear that the "person" who would inherit the property would do so, not by virtue of any statute but by heredity. The Crown could not take the property under section 46, but could only take it as bona vacantia, if there were no owner. There is, in the present case, an intestacy, and the residuary estate devolves on the next-of-kin of the testator. [Reference was made to *Boarland (Inspector of Taxes)* v. *Madras Electric Supply Corporation*[2]; *In the Estate of Hanley*,[3] and *In the Estate of Maldonado, decd.*[4]]

Denys Buckley for the Treasury Solicitor. The Crown's right to take by escheat is abolished by section 45 of the Act of 1925. Section 46, however, contains a complete code as to who is to take. The question is whether the Crown is a "person" who would have been entitled to the property under section 46 at the death of the widow if she had died intestate. It is clear, so far as the residuary estate is concerned, that the Crown takes by statutory title. The statute replaces the earlier prerogative right to bona vacantia. The right of the Crown is the right referred to in Part IV of the Act (headed "Distribution of Residuary

---

[2] [1954] 1 W.L.R. 87; [1954] 1 All E.R. 52.

[3] [1942] P. 33; [1941] 3 All E.R. 301.

[4] [1953] 3 W.L.R. 204; [1954] 2 W.L.R. 64; [1953] 2 All E.R. 1579.

"Estate"), and the Crown is a "person" who becomes entitled under the Act.

WYNN-PARRY J. I have already intimated during the course of the argument that on the evidence I propose to proceed on the basis that the widow of the testator was illegitimate. The right, therefore (if any), of her mother, the first defendant, must arise under the Legitimacy Act, 1926; but, in view of the language of the will, it is, in my judgment, clear that that Act can have no application. The relevant words in the will, which clearly was a professionally prepared will, are, in the disposition of the residuary estate in the events which have happened, as follows: "In trust for such person or persons for such estates or estate "interests or interest and subject to such powers and provisions "as my said wife shall from time to time by will or codicil "appoint"—I may say in passing that the evidence does not disclose that any such appointment was made—"and in default "of and subject to any such appointment in trust for such "person or persons who would have been entitled thereto under "Part IV of the Administration of Estates Act, 1925, at the "death of my said wife had she died possessed thereof intestate "without having been married such persons to take (and if more "than one) in the shares and manner in which they would have "taken under the said Part of the said Act." In my view, those words disclose a clear formula admitting of no element of ambiguity, and they amount to this: that the residuary estate is to be distributed among the person or persons who would have been entitled if the relevant provisions of section 46 of the Administration of Estates Act, 1925, had been written out in full in the will. On that view it is clear that the first defendant can take no interest in the residuary estate. That leaves the question between the next-of-kin, on the one hand, and the Crown on the other hand.

It is conceded that, on the authorities which bind this court, the Crown is within the word "person" as used in section 46. But the point is made by Mr. Goulding, on behalf of the second defendant, who is a brother and next-of-kin of the testator, that on the true view of section 46 the Crown does not in any case take under the section, but by its prerogative right to bona vacantia where there is no owner. As Mr. Buckley pointed out in his argument, section 46 falls under Part IV, headed "Distribution of Residuary Estates," and is preceded by section 45 by which, inter alia, the right of the Crown to take by escheat is abolished. Then comes section 46, which from its form appears to me to be designed to set out in subsection (1) a complete and exhaustive code as to how the residuary estate of an intestate is to be distributed. There are six subparagraphs to subsection (1), and they proceed on the basis of dealing with the nearest relations in the first place, and, as they progress, with more and more remote relations. Then at the end subparagraph (vi) provides: "In default of any person taking an "absolute interest under the foregoing provisions, the residuary "estate of the intestate shall belong to the Crown or to the "Duchy of Lancaster or to the Duke of Cornwall for the time "being, as the case may be, as bona vacantia, and in lieu of any "right to escheat." Those last words "as bona vacantia" appear to me to be merely descriptive and fit in with the scheme of the subsection, which is only to bring the Crown in at the very end of what I have described as a complete and exhaustive code.

By section 57 it is expressly provided that the Crown is to be bound by this Act. Where, therefore, I find a subsection setting out a complete and exhaustive code, I think that the true view must be that the Crown takes directly under the statutory provision in section 46 (1) (vi), and not by any prerogative right under which, but for the statute to which the Crown submits, it would otherwise have taken.

Therefore, for these reasons, I propose to answer question 1 of the summons by declaring that, in the events which have happened, the residuary estate of the testator ought to be held, as from the death of his widow and subject to the annuities bequeathed by his will, on trust for the Solicitor for the Affairs of Her Majesty's Treasury. The order will have a provision authorizing the trustees to distribute on the basis that the testator's widow did not leave surviving her any of the persons named in section 46 (1) (i) to (v) inclusive.

Order accordingly.

Solicitors: *Bird & Bird for Sydney Mitchell, Chattock & Hatton, Birmingham; Treasury Solicitor.*

J. L. D.

C. A.

1954
Mar. 15, 16,
25.

Evershed M.R.,
Denning and
Romer L.JJ.

MINISTER OF HEALTH *v.* GENERAL COMMITTEE OF THE ROYAL MIDLAND COUNTIES HOME FOR INCURABLES AT LEAMINGTON SPA.

[1953 H. 3762.]

National Health Service—Hospital—Meaning—Home for incurables—No curative treatment provided—Whether home transferred to Ministry of Health—National Health Service Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 81), *ss.* 6 (1), 79.

"Hospital." "Treatment."

A home, established in 1874, was (inter alia) for the reception of persons suffering from certain incurable diseases who required medical supervision and nursing:—

Held (Denning L.J. dissenting), that the home was a "hospital" within the meaning of section 79 (1) of the National Health Service Act, 1946, since "hospital" there included any institution for the reception and treatment of persons suffering from any disability requiring nursing, as distinct from medical or dental treatment, in the sense that the inmates were cared for by persons who were professionally trained to care for the sick. The home was accordingly vested in the Minister under the Act of 1946.

Per Denning L.J. A "hospital" as defined was an institution whose main purpose was to treat patients for their illnesses by the exercise of professional skill. If the main purpose of the institution was only to take care of the patients and to make life more comfortable for them, it was not a "hospital" but a "home." On the facts the primary purpose of this home was reception and care of the incurables as distinct from treatment. It was, therefore, a home and not a "hospital."

Royal Victoria Hospital, Dundee v. *Wheatley* (unreported) approved.

Decision of Vaisey J. [1954] 1 W.L.R. 79 reversed.

APPEAL from Vaisey J.[1]

The Royal Midland Counties Home for Incurables at Leamington Spa (hereinafter called the "home") was established in 1874 and became a charity regulated by a trust deed dated June 27, 1884. By rule 2 of the rules in force in July, 1948, the object of the home was "to give relief by admission to the home or by "pensions as hereinafter provided to persons of good character "of limited or reduced income, who are suffering from incurable "or chronic diseases or incapacity owing to injury or wounds. "No person suffering from insanity, imbecility, epilepsy, cancer

---

[1] [1954] 1 W.L.R. 79.

"or pulmonary tuberculosis, past or present, shall be eligible as "an in-patient, and no case shall be admitted unless it requires "medical supervision and nursing. Persons suffering from "epilepsy and cancer shall be eligible for pensions."

The staff of the home included, at the material time, 48 full-time nurses and 29 part-time nurses, and there was a visiting physician and a visiting surgeon who visited the home regularly on alternate days, as well as an honorary dental surgeon and an honorary ophthalmic surgeon. The treatment given at the home was palliative only, except that medical treatment was given to any of the inmates who developed diseases or illnesses, other than those incurable complaints from which they suffered on admission. The home was administered by the committee who decided, with the assistance of reports from the visiting physician, all questions relating to the admission or discharge of patients. On the coming into force of the National Health Service Act, 1946, the question was raised whether the home was a hospital within the meaning of that Act,[2] and accordingly, whether on July 5, 1948, the appointed day under that Act, the home was transferred to and vested in the Minister of Health as a nationalized institution by virtue of section 6 (1) of that Act.[2] The question was referred to arbitration, and on July 29, 1953, the arbitrator stated his award, in the form of a special case, that the home was not a hospital for the purposes of the Act. On appeal Vaisey J. affirmed his award, and the Minister of Health appealed.

---

[2] National Health Service Act, 1946, s. 6 (1): "Subject to the provisions of this Act, there shall, on "the appointed day, be transferred to "and vest in the Minister by virtue "of this Act all interests in or "attaching to premises forming part "of a voluntary hospital or used for "the purposes of a voluntary hospital, ". . . being interests held immediately before the appointed day by "the governing body of the hospital "or by trustees solely for the purposes of that hospital, . . ."

S. 9 (1): "For the purposes of the "foregoing provisions of this Part of "this Act . . . 'hospital' includes, "in addition to the premises specified "in the definition . . . in section 79 ". . . any clinic [etc.] . . . not being "— . . . premises forming part of or "ancillary to any institution or undertaking of which the main purpose "is not therapeutic."

S. 79 (1): "In this Act unless the "context otherwise requires, . . . "'hospital' means any institution "for the reception and treatment of "persons suffering from illness or "mental defectiveness, any maternity "home, and any institution for the "reception and treatment of persons "during convalescence, or persons "requiring medical rehabilitation, "and includes clinics, dispensaries "and out-patient departments maintained in connexion with any such "institution or home as aforesaid, and "'hospital accommodation' shall be "construed accordingly; 'illness' "includes mental illness and any "injury or disability requiring "medical or dental treatment or "nursing."

The facts are more fully stated in the judgment of Evershed M.R.

Geoffrey Cross Q.C. and *Denys Buckley* for the Minister of Health. If premises at the appointed day formed part of a voluntary hospital or were used for the purposes of a voluntary hospital they have been transferred to the Minister. The use at the appointed day is the relevant test: see *In re Marjoribanks' Trust Deed.*[3] The question here is whether the premises are a "hospital" within section 79 of the National Health Service Act, 1946. They were without doubt maintained voluntarily at the material time. This was an institution for persons suffering from incurable diseases; they were not admitted to the home unless they required medical supervision and nursing. They were, therefore, suffering from "illness" as defined in section 79 of the Act of 1946. The definitions in section 79 are qualified by "unless the context otherwise requires," but there is no reason why the definition of "illness" should not be read into the definition of "hospital" so that an institution for the reception and treatment of persons requiring "medical . . . treatment or "nursing" is a hospital within that provision. That interpretation is supported by the specific mention of convalescent homes, for in convalescence the emphasis is on nursing treatment rather than medical treatment in the narrow sense. "Treatment" is used in a wide sense as covering all that is done for the inmates of the hospital after they have been received. It would include curative treatment if that was appropriate. In the present case, however, curative treatment was not envisaged since the inmates were incurable. Palliative treatment was given to those patients who would benefit by it, and that treatment, and the treatment for diseases subsidiary to those for which the inmates were admitted, was carried out under medical supervision so that it was "medical treatment." The definition of "hospital" in section 79 includes an institution for the reception of persons suffering from mental illness, but if the respondents' contention is correct a home for mental defectives is outside the scope of the section unless the patients receive medical treatment of a curative nature. It is not essential that all the inmates should receive medical treatment in order that the institution should come within section 79, or that the main purpose of the institution should be to provide such treatment. The definition is wide enough to include institutions for the incurably sick and incurably insane. Vaisey J. limited the meaning of "treatment" to curative treatment, but that is not the natural meaning of the word, nor is it consistent with the decision in *Royal Victoria Hospital, Dundee* v. *Wheatley*,[4] a Scottish decision, but one which, it is submitted, the court would be slow to disregard in that it concerned a statute in terms similar to those in point here. The purpose of the Dundee hospital was not to provide curative treatment, and, judging by the ratio between nursing staff and doctors and the inmates, the treatment provided was not more extensive than that provided in the Leamington home. The only material difference between the Dundee hospital and the Leamington home was that the policy of the Scottish home was to admit persons whose expectation of life was short, and the inclusion of cancer in the list of qualifying diseases increased that tendency. In the Leamington home the inmates came to live rather than to die.

---

[3] [1952] Ch. 181; [1952] 1 T.L.R. 224; sub nom. *Re Marjoribanks' Indenture* [1952] 1 All E.R. 191.

An important purpose of the home is to provide a suitable home for these unfortunate persons for the rest of their lives and not merely to give them a course of palliative treatment. Some treatment is given, however, and this home is not, on the facts, merely a home for old people, for no one was admitted unless he or she suffered from an incurable disease requiring medical supervision and nursing. "Reception and treatment" are given equal emphasis in section 79; it is not necessary to show that "treatment" was the primary purpose. *Tendring Union* v. *Woolwich Union*[5] is distinguishable. That was a poor law case where different considerations applied, and, further, no treatment was given. The union was, in substance, an educational establishment and no persons were admitted unless they could eventually support themselves.

The definitions of "hospital," in the Public Health (London) Act, 1936, s. 304 (1), the Public Health Act, 1936, s. 343, the Voluntary Hospitals Act, 1936, s. 1, and the Road Traffic Act, 1930, s. 36 (2), are of no assistance here, for they do not show any consistent definition.

The arbitrator did not merely find the facts and conclude that this was not a hospital; he stated his reasons, and they indicate that he based his construction on the wrong basis.

[4] Unreported.

[5] [1923] 1 K.B. 121; sub nom. *Tendring Union* v. *Braintree Union*, 36 T.L.R. 512.

Buckley following. "Treatment" is a word of general import taking its meaning from the particular context. The Act of 1946 was intended to provide a "comprehensive" health service and it would be expected, therefore, that a wide meaning would be given to "hospital." "Treatment" does not necessarily mean medical treatment; in the context its meaning must be derived from the definition of "illness," which includes any disability requiring nursing, as distinct from medical or dental treatment. Treatment is not, therefore, in this context limited to medical treatment. It means such treatment as is appropriate to the illness from which the person is suffering. It may include medical treatment or nursing, or it may be nursing alone if that is all that the patient requires. Nursing is just as much "treatment" as the administration of drugs or other forms of medical treatment. "Nursing" in this context means that kind of attention which is normally given by a trained nurse, and medical supervision is a necessary precursor to such treatment. The inclusion of convalescents and mental defectives in section 79 reinforces the wider construction. Convalescence is used in distinction from medical rehabilitation; that is where some form of medical treatment is required. Not all convalescent homes are within the definition, for the section refers to "treatment of "persons during convalescence," implying that the homes within the definition are those where some treatment is provided; but in a convalescent home treatment would not be the primary purpose.

Even if nursing cannot be regarded as "treatment," it was an object of this institution to give treatment in the medical sense, though possibly not as a primary object. Medical treatment was given to all the inmates who required medical treatment, and on the facts as found that could fairly be regarded as an object of the institution. It is not relevant that not all the inmates would require the treatment at any one time; they were all ill and likely to require medical treatment at some time.

Charles Russell Q.C. and *H. E. Francis* for the Committee. A "hospital" within the definition of section 79 of the Act of 1946 is an institution for the treatment as well as the reception of the persons therein referred to. The interpretation put on the definition of "hospital" for the appellant makes the words "and "treatment" otiose. Some meaning must be given to these words as distinct from "the reception of."

The Act of 1946 is of its nature confiscatory, no compensation being provided, and, therefore, if it be alleged that a particular institution is within its ambit, that must plainly appear from the wording of the statute, and any doubt should be resolved in favour of those who contend that the institution has not been compulsorily acquired. If this institution is not within the Act, it will remain that which the founders intended, namely, a home for incurables; but if the Minister takes it over he need not keep it for that purpose if some other use seems to him to be more convenient or necessary. The arbitrator plainly took the view that this institution was not what the ordinary person would regard as "a hospital," and there is nothing in the language of the Act which renders necessary a departure from the ordinary meaning of the word.

The appellant has sought to show that an institution is a hospital if it provides care and attention for the sick. That, however, is not "treatment" for the purposes of section 79. It is significant that the Act does refer to "care" in other sections, e.g., section 24; and no doubt if care and attention had been meant in section 79 the draftsman would have said so. Treatment in this context means more than merely looking after persons; it includes giving medical treatment applicable to the particular illness. It may be a question of degree how far medical treatment can be said to be an object of an institution, but the arbitrator has found here that medical treatment was only a very small part of the objects of the home. The vital question here is whether "treatment" means therapy, that is, medical treatment as given by doctors and nurses, or whether it means merely care and attention, doing something for a person which, if in normal health, he or she would do for himself or herself. Medical treatment is doing something which is designed to cure disease or to alleviate pain or symptoms. It was said in *Royal Victoria Hospital, Dundee* v. *Wheatley* [6] that if the home had not been taken over as a hospital there would have been a gap in the health services, but that is incorrect, for there is nothing to prevent the Minister from establishing homes for incurables. The sole question is whether he is entitled to take over this one. In *Royal Victoria Hospital, Dundee* v. *Wheatley* [6] the points taken here did not arise because of the wording of the charter. In that case the Lord President said that it was not possible to have therapeutic treatment of incurables.

Section 9 supports the interpretation put on the definition of "hospital" in section 79 by the respondents. An institution is not taken over if the main purpose is not therapeutic, and the

[6] Unreported.

strong inference from that is that the Act applies only to institutions which are primarily therapeutic, that is, to institutions where the medical treatment of disease is practised. It follows that an institution whose main purpose is not therapeutic would not be within the scope of the definition. *Royal Victoria Hospital, Dundee* v. *Wheatley*[6] is distinguishable, for there it was held that the hospital was devoted to the alleviation of the symptoms of disease.

It is not disputed that some nursing may be "treatment," but on the facts here the work done by the nurses, who for the most part were not State-registered nurses, had nothing to do with treatment. The arbitrator was right when he rated this ordinary routine nursing as part of the "home" aspect of the institution and not as medical treatment. He was right in finding that treatment was only an incidental or minimal purpose of the home. This was on the facts an institution which provided a home for certain kinds of incurables; it was not a hospital. The Dundee hospital was a place where people went to die; their expectation of life being short. But here the inmates go to live. This is a home, and in many cases the patients live a long time there. They can go away for holidays; but it is inconceivable that the inmates of the Dundee hospital could have done that. Here most of the inmates were admitted because there was no one in their own homes who could look after them adequately; when they went on holiday they would probably be able to get the same "treatment" as in the home for a short time. There is no significance in the use of the word "patients" to describe the inmates, for one of the objects of the home was to provide pensions for those incurables who could remain in their own homes, and these were also called patients. On the facts as found by the arbitrator the object of this institution was to provide a "home" rather than a "hospital." Treatment was not an object for which the establishment was founded.

The appellant has relied on the specific mention of convalescence in the definition of "hospital" as showing that the emphasis is not on medical treatment; but it is incorrect to say that medical treatment is not needed for convalescents. Not all convalescent homes are within the section. It applies only to those whose main purpose is to afford medical treatment.

It is not essential to read the whole of the definition of "illness" into the definition of "hospital." That definition is qualified by " unless the context otherwise requires "; and the definition of " hospital " provides a context which excludes reading in the part of the definition " or nursing " which the appellant contends brings within the definition of " hospital " persons who only require routine nursing as distinct from medical treatment. The full definition of " illness " is applicable in, e.g., sections 24 and 28. In the definition of illness " nursing " is used in contrast to " treatment "; it is not merely another kind of treatment. In the definition of " hospital " treatment has a limiting effect and excludes mere nursing.

---

[6] Unreported.

Geoffrey Cross Q.C. replied.

Cur. adv. vult.

March 25. EVERSHED M.R. The question in this case is whether in terms of section 6 (1) of the National Health Service Act, 1946, an institution known as the Royal Midland Counties Home for Incurables at Leamington Spa was by virtue of that Act " transferred " to the Minister of Health on July 5, 1948, being the vesting date under the Act. Subsection (1) provides: " There shall, on the appointed day, be transferred to and vest in " the Minister by virtue of this Act all interests in or attaching " to premises forming part of a voluntary hospital or used for " the purposes of a voluntary hospital. . . ." The answer to the question depends on whether the institution I have named was a " voluntary hospital "—or, rather, since no question arises as to its voluntary character, a " hospital," within the section; and that question was submitted to the arbitrament of Mr. H. A. H. Christie Q.C., pursuant to rules made under section 9 (8) of the Act.

The problem in every case is prima facie one of fact or degree; that is, whether as a fact, on the relevant date the institution in question answered the description of a " hospital " as defined by the Act. In the present case the question posed was answered negatively by the arbitrator, and his award, having been stated in the form of a special case, was affirmed by Vaisey J.

It is plain that the arbitrator went into all the facts and circumstances relating to the home (as I shall for brevity call the institution here in question) with the greatest care and thoroughness. His award extended to 30 paragraphs, and he attached to it very numerous exhibits. In this court we have not examined those exhibits or been involved in any consideration of the evidence. The question has been whether, on the face of the award, the arbitrator has in any respect misdirected himself by misconstruing the relevant provisions of the Act; and, if so, what, upon the facts as found, the true construction should be, or, possibly, whether the arbitrator has found the necessary facts at all.

Certain facts are clear. They were found by the arbitrator and are not now in dispute. Thus: (1) All the "inmates" (to use for the present purposes a word of negative significance) of the home are sufferers from incurable diseases; but those suffering from certain diseases or disabilities, notably insanity, cancer and tuberculosis, are, and always have been, excluded; so that the inmates may generally be described as persons suffering from, and incapable of being cured of, rheumatic or arthritic complaints on the one hand and, on the other, nervous complaints (for example, Parkinson's disease). (2) On the vesting date (July 5, 1948) there were 112 such "inmates" at the home; a figure slightly, but insignificantly, less than the average over a number of years. The home also provided "pensions" to other incurably disabled persons who lived in their homes and were no part of what may be called the complement of the home, receiving no "treatment" (however that word be construed) at the home. At the vesting date there were 20 such pensioners. These pensioners may be disregarded for the purposes of the present appeal. (3) The fact that the "inmates" suffer from the diseases of the kind which I have mentioned, and that they are "incurable," is not, and never was, a sufficient reason for their reception at the home. It is, indeed, well known that many people are afflicted with some form of rheumatism or arthritis from which they cannot be cured. Rule 2 of the rules of the home was in the following terms: "The object shall be to give "relief by admission to the Home or by pensions as hereinafter "provided, to persons of good character, of limited or reduced "income who are suffering from incurable or chronic disease, or "incapacity owing to injury or wounds. No person suffering "from insanity, idiocy, imbecility, epilepsy, cancer or pulmonary "tuberculosis, past or present, shall be eligible as an in-patient, "and no case shall be admitted unless it requires medical supervision and nursing. Persons suffering from epilepsy and cancer "shall be eligible for pensions."

The arbitrator found, and the respondents admitted, that this rule was "observed in principle." I emphasize the use of the word "relief" in the first line of the rule, and the penultimate sentence: "No case shall be admitted unless it requires medical "supervision and nursing."

C. A.
1954

MINISTER OF HEALTH
v.
ROYAL MIDLAND COUNTIES HOME FOR INCURABLES.

Evershed M.R.

(4) The staff of the hospital included both domestic staff and nursing staff. The numbers of the former are not stated in the award. As regards the latter I cannot do better than set out paragraph 10 of the award: "In 1948 there were 48 full-time "and 29 part-time members of the nursing staff. The matron "(Mrs. Parr, formerly Miss G. Lingwood) told me that the "proportion of nurses to patients was slightly less than in a "general hospital and that there would be rather more State-"registered nurses in a general hospital. I think this may have "been an understatement. Anyhow, it is clear that the senior "members of the nursing staff at the home were, generally "speaking, older than in a general hospital and that the nursing "required was more routine and of a slower tempo. Mrs. Parr "spoke highly, and I have no doubt deservedly, of the high "standard of cleanliness observed by the nurses under her." (5) The medical staff of the home consisted of a visiting physician and a visiting surgeon, who visited the home regularly on alternate days. There were also an hon. dental surgeon and an hon. ophthalmic surgeon who attended "patients" when required; but there was no resident medical officer. (See paragraph 7 of the award.) (6) The diseases of the "inmates" being, ex concessis, incurable, there was, of course, no "treatment" at the home designed to cure them. There was, however, at the relevant date "palliative treatment" being administered to about one-third of the "inmates"; by which I understand to be meant treatment of the nature of physiotherapy, massage, and so forth, designed to alleviate suffering or arrest the disease. Medical attention and "treatment" was also available and administered in the case of "inmates" who might from time to time suffer additionally from what may be called casual illnesses—for example, influenza, bronchitis or pneumonia. It may be added that an "inmate" who died, commonly died as a result of such a "casual" complaint—the diseases from which they suffered not being per se fatal, but no doubt such as to render the sufferers more susceptible to the consequences of casual illnesses. (7) Finally, there was considerable liberty of movement, "inmates" being free largely "to do as they pleased," and many of them going away for "holidays" in each year of a month's duration or thereabouts.

These, broadly, are the facts as they were found; and so far there is no dispute upon them. I shall have occasion later to refer to certain more detailed conclusions or inferences on the part of the arbitrator. But it will be convenient now to recite the essential definitions. Section 79 (1) of the Act provides that: "Unless the context otherwise requires . . . 'Hospital' "means" (not, be it observed, "includes") "any institution for "the reception and treatment of persons suffering from illness or "mental defectiveness, any maternity home, and any institution "for the reception and treatment of persons during convalescence, "or persons requiring medical rehabilitation. . . . 'Illness' "includes" (not in this case "means") "mental illness and any "injury or disability requiring medical or dental treatment or "nursing."

Two points may be made at once upon these definitions. First, it is, to my mind, clear from the references to "any "maternity home" and any convalescent home, and so forth, that the word "hospital" is intended to have, and has, a wider significance for the purposes of the Act than that of what may be called an ordinary general hospital. Secondly, the test, so far as relevant, is that the institution should be one both for "reception" and for "treatment." No question here arises as regards "reception." The contest in this case is in reference to the second limb. Are the words "for treatment" here satisfied?

The conclusion of the arbitrator was expressed by him in paragraph 17 of his award thus: "In view of the foregoing "and after considering the evidence and agreed documents I "find as a fact that immediately before the appointed day "the main purpose of the home was to provide the patients with "the care and attention they required in pleasant surroundings "with the necessary nursing under adequate medical supervision. "The provision of palliative medical treatment, treatment for "intercurrent complaints and physiotherapy were, of course, "objects of the home, but I hold that they were subsidiary to its "main purpose and could not be regarded as either independent "or co-ordinate purposes."

It has been the argument of the appellant Minister that this paragraph involves, ex facie, a misconstruction of the Act, and particularly of the essential word "treatment"; and so is wholly vitiated. It is said that the language which I have quoted, and especially in its context the phrase "with the necessary nursing" under "medical supervision," shows clearly that in the arbitrator's view the word "treatment" in the definition of the "hospital" is confined to medical (or dental) treatment, so as to exclude nursing or, at least, so much of nursing as has been called "routine nursing," as distinct from nursing which is in form and fact medical treatment; and that such a view gives altogether too narrow an interpretation to "treatment." In my judgment, the arbitrator did so construe the word "treatment." I think that that conclusion inevitably follows from the second part of the paragraph I have quoted, in which the arbitrator seems to me clearly to indicate that the only "treatment" provided by the home was the palliative treatment I have mentioned, and the treatment required to deal with casual illnesses. I think that the same conclusion flows also from the latter part of paragraph 21 of the award, in which the arbitrator expressly rejected Mr. Cross's argument for a construction of the word "treatment" wide enough to comprehend skilled nursing. "Although," he said, "no doubt "it is often the duty of a trained nurse to give treatment, I do "not think nursing itself, especially the type of nursing given "at the home, is 'treatment' within the meaning of the definition of the Act. Moreover, the definition of 'illness' does at "any rate indicate that nursing and treatment are two different "things." Paragraph 23 of the award is also relevant: "I "think, too, that 'treatment' means medical or surgical treatment, in which I would include the giving of drugs either to "cure the disease, to mitigate or alleviate the symptoms or to "relieve pain and physiotherapy directed to the same purposes."

I am unable to accept this narrow view of "treatment." In my judgment, "treatment" in the definition of "hospital" includes not only medical treatment (I can leave out, for present purposes, dental treatment), in the sense that the patient or subject is looked after and attended to by a doctor, but also nursing in the sense that the subject or patient is looked after and attended to by persons professionally trained to look after and attend to the sick. In my view, such a conclusion follows inevitably from a reading together of the two definitions of "hospital" and "illness"; for, so read together, "hospital" means (inter alia) "any institution for the reception and treatment of persons suffering from . . . any . . . disability "requiring . . . nursing." And, I add, "requiring nursing as "distinct from medical or dental treatment."

This view of the definitions is, to my mind, supported by the generally broad scope given to the word "hospital," to which I have already alluded. But Mr. Russell, for the committee, sought to escape from this result by contending that, in reading the definition of "illness" into the definition of "hospital," there was a contrary context requiring the exclusion, in effect, of the words "or nursing." It would, in my judgment, be highly surprising if such a contrary intention emerged from the reading together of two adjacent definitions, and certainly not less so where the second is introduced by the word "includes." It is true that from other sections of the Act a distinction may be discerned between "treatment" and mere "care" (which I assume to comprehend "looking after" by persons not professionally trained for such purpose)—see, for example, the reference to "the care of persons suffering from illness" in section 28 (1). Mr. Russell sought also to derive support from section 9 (1), a section designed to give, in certain circumstances, a significance to the word "hospital" expanded beyond the definition, which, after referring to "treatment by or under the "direction of medical or dental practitioners," excepts from the scope of the Act premises forming part of a larger institution "of which the main purpose is not therapeutic." From this last reference Mr. Russell pressed upon us the unlikelihood of an intention, by Parliament, that the Minister should take over any single institution "of which the main purpose is not therapeutic," a word which (as he contends) is not apt to describe an institution for the treatment of the sick otherwise than medically (or dentally). I do not find it necessary (any more than did the Scottish Court of Session in the case later mentioned) to define the word "therapeutic" in its context in section 9 (1), for I am clearly of opinion that the inferences drawn by Mr. Russell from his other references to the Act are insufficient to confine, as he wishes, the meaning of the word "treatment" in the definition of "hospital." Indeed, these references tend to confirm my own strong impression that if in its definition of "hospital" Parliament had intended to confine "treatment" to medical or dental treatment, Parliament would, following its own example, have said so in clear and obvious terms.

We were referred to definitions of "hospital" taken from other Acts, by no means in pari materia; for example, the Road Traffic Act, 1930. But I have not, for my part, been able to derive any assistance from them towards the solution of the present problem. Nor have I been able to discover any useful application to the present case of the alleged principle of the interpretation of statutes that provisions tending to be confiscatory in effect should be construed in favour of the subject. Assuming (though I do not concede) that the National Health Service Act, 1946, has any confiscatory flavour, still the problem here is, having interpreted the definition provisions of the Act according to their ordinary sense, to decide whether, upon the facts, the Royal Midland Counties Home for Incurables is comprehended by the definition—a process which does not seem to me to give any sensible scope for the application of the principle invoked.

On the other hand, I have been much assisted towards my conclusion by the decision of the Inner House in the Scottish case of *Royal Victoria Hospital, Dundee* v. *Wheatley*.[1] Both the arbitrator and Vaisey J. regarded the facts of the Dundee hospital as very different from the facts of the Leamington Home for Incurables. I agree that they are different. The matter was put thus epigrammatically by Vaisey J. in the course of his judgment: "While the home at Leamington "is essentially a place in which its inmates come to live, the "hospital at Dundee is one where they come to die." I may observe, in passing, that since the Leamington inmates are all suffering from incurable diseases, they must be taken to have come there to die as well as to live. Still, it is true that in the *Royal Victoria Hospital* case,[1] in the selection of the persons chosen for admission, preference was given to those whose end was near, and particularly to those suffering from advanced inoperable cancer, a disease expressly excluded at Leamington. It followed, therefore, that, at least to a substantial extent, the inmates of the Dundee hospital died directly from the diseases from which they, unhappily, suffered. But although the precise point argued before us does not appear to have been expressly taken in the Scottish court, it seems to me clear from the opinion of the Lord President that he interpreted the word "treatment" in the sense which I have attempted to express. "By a hospital for incurables," said Lord Cooper, "I mean a "hospital for the reception of patients whose recovery is not "expected . . . and for whom all that can normally be done is "to provide skilled nursing and alleviation of suffering . . ." Then later he thus interpreted the relevant definitions in the corresponding Scottish Act: ". . . there is transferred to the "Secretary of State every institution for the reception and "treatment of persons suffering from . . . any disability requir-"ing . . . nursing." I may add that, to judge from the facts recited in the Lord President's opinion, the relative extent of the medical (or nursing) facilities provided at Dundee was certainly no greater than that provided at Leamington. I should, for my part, be very slow to arrive at a conclusion on the meaning of the relevant sections of the National Health Service Act, 1946, which was at variance with the interpretation put in Scotland upon the corresponding enactment applicable in Scotland.

---

[1] Unreported.

But my conclusion on the matter of construction is not the end of the present case; for there remains the question whether, none the less, the findings of fact of the arbitrator remain valid in favour of the committee; or, alternatively, whether, having regard to the facts as found, we can, or ought, now to determine the essential question between the Minister of Health and the committee. It is upon this part of the case that I have, for my part, felt the greatest difficulty.

I have had the advantage of reading in advance the judgment about to be delivered by Denning L.J. My brother agrees with my conclusion upon the meaning properly to be attached to the word "treatment"; but, even so, he is of opinion that the findings of the arbitrator mean, and should be taken as deciding (as a matter of fact) that the Leamington Home was not on the relevant date within the scope of the Act. My brother particularly cites an earlier passage from paragraph 21 of the award (from which I have already taken a later extract). "Such "treatment," quotes Denning L.J., "as was given was merely "subsidiary to the real purpose of the home" (which was to) "provide the patients with the care and attention they required "in pleasant surroundings." In short, according to my brother, a home from home. I regret that I have been unable to arrive at the same conclusion. Treating the question as one of interpretation of the award, of discerning from the terms of the award what would have been the arbitrator's conclusion on the facts had he construed the definitions in the same sense that I have done, my inclination is to the opposite conclusion from that of my brother.

The language which my brother has quoted from paragraph 21 was stated by way of answer (and must therefore be read in reference) to the argument put forward by Mr. Cross for the view that the home did give the patients medical treatment, and that it existed for that purpose. So read, the language quoted seems to me, I confess, at best inconclusive. But there are unquestionably passages in the award tending to support what I will call the "home from home" view. Thus in paragraph 16: "I am quite satisfied that the atmosphere of the place was "much more homelike than that of any hospital, everything "was much less formal, even the records and reports." In paragraph 14: "No doubt the matters I have mentioned "in this paragraph constituted palliative and symptomatic treat-"ment, but they formed only a relatively small part of the "activities of the home. The quantity of drugs and dressings "consumed bears no relation to the requirements of an ordinary "hospital of comparable size." Again, in paragraph 11: "The "policy of the committee was to admit those who were likely "to settle down for life and make the premises their permanent "home. Only those applicants were accepted whose disease had "reached such a stage that no real improvement in their con-"dition could be expected. On the other hand, patients who "were likely to die shortly were not accepted." And, perhaps strongest of all, in paragraph 13: "Mr. Badger, the secretary, "told me that he was often asked by the relatives of prospective "patients what sort of treatment they could expect and he "always replied 'You can expect no treatment whatsoever here' ". . . but I am satisfied that patients were admitted on the "footing that they would get the care and attention and nursing "they required but could not expect any specific treatment for "their complaint."

On the other side, however, are passages tending, as it seems to me, no less strongly in the opposite direction. I have already stated the substance of paragraph 7 (as to the extent and character of the medical supervision) and quoted in full paragraph 10 (as to the extent of the nursing staff). By no means less cogent is the fact that (as I have earlier recited) the terms of rule 2 of the home's rules were "observed in principle"; and rule 2 concluded (it will be recalled) with the words "and no "case shall be admitted unless it *requires* medical supervision "*and* nursing." I add the following two citations from paragraph 9 of the award: "On application for admission each "patient had to supply a medical certificate that he was suffer-"ing from a specified disease, was considered to be incurable and "eligible under rule 2." "About a month after admission "Dr. Clayton would report to the committee whether the patient "was suitable for retention in the home."

I have, therefore, been conscious of a serious doubt in my own mind whether, in the absence of a full examination into the whole of the evidence, this court is in a position to substitute in the matter a final conclusion of its own for that of the arbitrator. As I said at the beginning of my judgment, the question being one of fact may, in the end, be one of degree. A hospital, as Vaisey J. observed, is not a hospital within the Act because it is called a hospital, or excluded from the Act

C. A.
1954

Minister of Health v. Royal Midland Counties Home for Incurables.

Evershed M.R.

because it is called a home. Equally, I conceive, an inmate cannot be said to be receiving treatment from persons professionally qualified to tend the sick because those persons are called, or call themselves, nurses. On the other hand, the court will naturally be reluctant to refer the matter back to the arbitrator for still further debate; particularly after so comprehensive a series of findings as we have in the present case. And I have had the advantage of reading in advance the judgment about to be delivered by Romer L.J., who has reached a clear conclusion that the findings of fact by the arbitrator lead inevitably to a result in favour of the Minister, once the correct interpretation of the word "treatment" is substituted for that which was at the root of the arbitrator's essential paragraph 17.

In all the circumstances, and after anxiously considering the various passages in the award which I have extracted and, for convenience, set out above, I have felt satisfied that my inclination, already stated, can be properly justified, and I agree, accordingly, with Romer L.J. in holding that the Royal Midland Counties Home for Incurables at Leamington was a "hospital" within the meaning of the National Health Service Act, 1946, and that the property vested, accordingly, in the Minister on July 5, 1948.

In my judgment, the appeal should be allowed and (subject to any argument by counsel as to costs) an order should be made as prayed in the notice of appeal.

Denning L.J. It is very necessary to get the activities of the Royal Midland Counties Home in true perspective. The people who come to the home are not suffering from killing diseases like cancer, nor infectious diseases like tuberculosis, nor from distressing afflictions like epilepsy. They are simply people who are suffering from disabling complaints like arthritis or Parkinson's disease. Very few are bed-ridden. Most of them get about in wheelchairs or with sticks. They are people who would be looked after in their own homes if their relatives could manage it; but, as their relatives cannot manage it, they are taken in by the Midland Counties Home. They stay there for years—the average length of stay is 10 years—and quite half of them regularly go away for holidays of a month or so. Whilst there, they can do anything they like within reason. When their time comes to die, they do not, as a rule, die from their disabling complaint, but from one of the fortuitous supervening illnesses to which all mankind is subject. The staff, of course, do all they can to make life bearable for them. They give some of them physiotherapy. To others they give, when necessary, sleeping-tablets, aperients, hyoscine, and so forth; but the amount of drugs and dressings is far less than would be used in an ordinary hospital. Such being the activities of the home, the question is whether it is to be taken over by the State under the National Health Act. The arbitrator went very carefully into the case in all its aspects—it took five days before him—and he came to the conclusion that it was not a " hospital " within the meaning of the Act and was not taken over by the State; and Vaisey J. affirmed his decision. We have had very little of the material before us that was before the arbitrator. We have only had his findings. Upon them I must say that I agree with him.

The key to the legal position lies in the fact that the Act draws a sharp distinction between " treatment " and " care." (See sections 24 and 28 of the Act.) If an institution is provided for the reception and " treatment " of incurables, it is a hospital and is to be taken over by the State; but if it is provided only for their reception and " care " of them, it is not. Where is the line, then, to be drawn in this regard between " treatment " and " care "? Neither is defined in the Act, but " treatment " means, I think, the exercise of professional skill to remedy the disease or disability, or to lessen its ill-effects or the pain and suffering which it occasions; whereas " care " is the homely art of making people comfortable and providing for their well-being so far as their condition allows. " Nursing," too, is not defined; but it covers, I think, both treatment and care. Some part of it, indeed an important part, is the exercise of professional skill; but a goodly part, perhaps the larger part, is just kindness and attention. When the Act, therefore, defines " illness " as including any disease or disability requiring mental or dental treatment, or nursing, it means, I think, a disability which requires the exercise of professional skill, as distinct from a disability which only requires care and attention.

Likewise, when the Act defines " hospital " as an institution provided for the reception and treatment of persons suffering from illness, it means an institution provided for the exercise of professional skill upon them, as distinct from an institution provided for the care of them. There are, of course, many institutions which have both objects. Their purpose is to treat persons suffering from illness by the exercise of professional skill, and to look after them as well. The position of these institutions depends, I think, on their main purpose. If the main purpose

C. A.
1954

MINISTER OF HEALTH v. ROYAL MIDLAND COUNTIES HOME FOR INCURABLES.

Denning L.J.

is to treat patients for their illnesses by the exercise of professional skill, then the institution is a hospital. But if the main purpose is only to take care of them and make life more comfortable for them, then it is not a hospital but a home, and is not caught by the Acts. A subsidiary purpose may be to treat them by the exercise of professional skill, but this will not make it a hospital if the main purpose is that it should be a home for them. In an old people's home, there are often nurses with professional qualifications, but that does not make it a hospital. Some reliance was placed on the provisions for persons suffering from mental defectiveness and for persons during convalescence, but the governing word again is "treatment." If the main purpose of the institution is to treat the mental defectives or the convalescents by the exercise of professional skill, then it is a hospital; but if the main purpose is to take care of them, it is not.

Turning now to the Royal Midland Counties Home for Incurables, the rules say that "No case shall be admitted unless "it requires medical supervision and nursing." This rule was said of itself to make the home a "hospital" within the meaning of the Act. I do not think so. The rule would be satisfied by only a little professional skill being required for any particular person, whilst the main requirement was to look after him and give him a home.

It was said also that the arbitrator had in effect found it to be a hospital when he said in paragraph 17 that the main purpose was to "provide the patients with the care and attention they "required in pleasant surroundings with the necessary nursing "under adequate medical supervision." I do not think the arbitrator was there saying that much professional skill was needed. All he had in mind was that modicum of nursing and medical supervision which was necessary to satisfy the rule. I think that the key to the award is the finding of the arbitrator in paragraph 21 that "such treatment as was given was merely "subsidiary to the real purpose of the home" which was, as he had said, to "provide the patients with the care and attention "they required in pleasant surroundings." In short, it was a home from home. Thus interpreted, I see nothing wrong with the award. The arbitrator is the person to say on which side of the line any particular case falls. He has in effect held this to be a home and not a hospital, and we should, I think, uphold his decision. The Scottish case was simply a case on the other side of the line, where the main purpose was treatment. I realize that this case is very much on the borderline. Different minds may well come to different conclusions; but in a borderline case I think that the scales should come down on the side of independence. The voluntary charitable institutions have served this country so well that Parliament can only have intended to take them over when the overriding public interest demands it. If the position is left in doubt, they should be left to carry on their good work undisturbed. This was the view of Vaisey J., and I agree with him. I would dismiss this appeal.

Romer L.J. It appears to me that the question whether or not the Home for Incurables is within the vesting provisions of the National Health Service Act, 1946, turns largely upon whether the definition of "illness" in section 79 of the Act is applicable to that word where used in the definition, in the same section, of "hospital." The importance of this point lies in the fact that persons who are suffering from "illness" as defined in section 79 include not only those who require medical or dental treatment, but also disabled persons who do not need either of those kinds of treatment, but who do require nursing.

Mr. Russell, who was fully alive to the latent dangers to his argument which lurk in the definition of "illness," tried, naturally enough, to avoid them by saying that there is a repelling context in the definition of "hospital" which does not permit of its application.

It is clear that disabled persons who require nothing more than nursing (leaving aside for the moment the precise significance of that term) are within the general scope and purview of the Act as expounded in section 1. By that section the Minister of Health is charged with the duty of promoting the establishment of a comprehensive health service designed to secure improvement in the physical and mental health of the people and the prevention, diagnosis and treatment of illness, and to provide appropriate services accordingly. Now whether or not the definition of "illness" in section 79 is incorporated in the definition of "hospital," it plainly applies to illness as used in section 1; and, therefore, disabled persons who require nursing, but who do not require medical or dental treatment, are included amongst the persons for whose benefit the comprehensive health service was to be established. It is envisaged in section 1 that illness may be the subject of "prevention, diagnosis and treatment," and in the light of the definition of "illness," the only "treatment" that the disabled persons whom I have mentioned could receive, if they receive any at all, would be such "nursing" as their condition required. In relation to such persons, therefore, I deduce that the word "treatment" in section 1, if it is to have any meaning, can only be equivalent to "nursing." I would also infer that just as these persons are within the beneficial scope of the Act, so also the institutions where they receive their treatment would prima facie be within its operation. Mr. Russell's objection to the incorporation of the definition of "illness" in the adjoining definition of "hospital" was based on the view that the word "treatment" in the latter definition means only medical or dental treatment, and that treatment of that kind is inapt in relation to persons who require nothing more than nursing. If, however, I am right in thinking that section 1 contemplates nursing as being a form of treatment, this argument obviously loses its force; for if nursing is included in treatment for the purposes of section 1 there can be no sufficient reason why it should not also be within it for the purposes of the definition of "hospital"; and especially in view of the inference to which I have above referred. I would, accordingly, insert parenthetically in the definition of "hospital," after the word "illness," the words "including mental illness and any injury or disability "requiring medical or dental treatment or nursing." If so read, the word "treatment" which precedes the parenthesis would, by necessary inference, include the nursing of disabled persons and be in line with the scope of treatment envisaged by section 1. To put the matter in another way, I am of opinion that Parliament had three forms of treatment in contemplation under the Act; that is to say, medical, dental and nursing, and that the last has an independent existence of its own, although in the considerable majority of cases it would co-exist with one of the other two.

On this view, then, and unless the word "nursing" in rule 2 of the home's regulations bears a meaning different from that in the definition of "illness" in the Act, it would seem to follow that the home is a hospital for the purposes of the Act; for under the rule it is an essential condition of entry into the home that the candidate should be incurable or incapable and require nursing. I see no reason to presume any such difference in meaning, and, inasmuch as the arbitrator has found that the principle of the rule is observed by the committee, the home is, prima facie, in my judgment, within the Act.

If, then, I am right in this view, the burden is on the home to show that the nature of its activities and the lines upon which it is actually run are such as to exclude it from the operation of the Act. It has been suggested on their behalf that the institution is in substance a "home from home," and that most of the nursing which is provided is designed merely to make the patients more comfortable, as distinct from giving them relief from pain. I do not doubt that there are certain passages in the award, to which the Master of the Rolls has referred in his judgment, which seem to point in that direction, but the award as a whole does not, in my opinion, support the suggestion, and some of the findings are quite inconsistent with it. Notwithstanding the homelike atmosphere of the home to which the arbitrator refers, he finds that the patients receive the nursing which they require, which seems to me to be no more and no less than that which was in contemplation in the legislative definition of "illness" in relation to disabled persons. It is true that "nursing" means more than the mere "care" of persons suffering from illness (see sections 24 and 28 of the Act) and, presumably, refers to nursing of a professional character; but that the nursing in the home falls within this category is shown, in my opinion, by the fact that the staff consists of 48 full-time and 29 part-time paid nurses under the general control of a matron, and under the supervision of medical practitioners, and by the further fact that about one-third of the patients receive palliative treatment of various kinds which the nurses administer. Moreover, as appears from paragraph 10 of the award, the differences between the nursing staff at the home and that at a general hospital are differences merely of degree and not of character. If the arbitrator had found that all that the patients required was care and attention, and that that was substantially all they got, the position would have been very different. He did not, however, so find, and, indeed, such a finding would have been inconsistent, as it seems to me, with his statement that the principle of rule 2 was being observed by the committee of the home. In my opinion, accordingly, whatever may be the true scope and meaning of "nursing," the home has failed to show, and the arbitrator has not found, that that which is in fact provided at the home does not fall within it.

The essential point upon which I find myself at variance with the arbitrator is in the view, which emerges from paragraph 17 of the award, that the nursing which is provided by the home is not in itself "treatment," as that word is used in the definition of "hospital," but is properly to be included in the word "reception," and that the only "treatment" which is given in the home is the administering of palliatives and of other symptomatic relief. As I have already said, professional nursing is, in my judgment, "treatment" in relation to incurables, in the same way that it is, as I think, envisaged in the definition as "treatment" in relation to convalescents. I am, accordingly, of opinion that the home vested in the Minister in July, 1948, as being a "hospital" for the purposes of the Act. I find comfort and support for this view in the decision and judgments in *Royal Victoria Hospital, Dundee* v. *Wheatley.*[1] The similarity between that case and the present appears from the following statement of the objects of the Royal Victoria Hospital, which I quote from the judgment of the Lord Ordinary, Lord Blades: "In terms of its charter of incorporation the objects of the corporation are the maintenance of a hospital in or near Dundee for the reception and treatment of indigent and other persons in Dundee and district who are suffering from incurable disease and are thereby rendered incapable of performing ordinary duties and the giving of such relief and attendance as the corporation may deem proper to such outdoor patients as the corporation may admit; provided that no patient suffering from insanity (congenital or acquired) shall under any circumstances be admitted into the hospital. Incurability is the feature common to all cases admitted to the hospital and the alleviation of suffering is all that can be hoped for."

Then, in the course of his judgment, Lord Blades, after referring to the definition of "hospital" and "illness" in the National Health Service (Scotland) Act, 1947 (which are in the same terms as the definitions in the Act of 1946), said: "I do not think that it will be disputed that a person suffering from an incurable disease is suffering from a disability requiring medical treatment or nursing."

On appeal to the Inner House, the Lord President expressed a similar view. He said: "There is transferred to the Secretary of State every 'institution for the reception and treatment of 'persons suffering from . . . any disability requiring . . . 'nursing.' On the terms of the pursuer's charter and in view of the evidence it is too plain for argument that the Royal Victoria Hospital is such an institution." It is true that the practice of the hospital was to give priority of admission to patients whose disease had progressed to such an extent that their expectation of life was short, whereas in the present case the practice has been not to accept patients who were likely to die in the near future, but I do not myself think that that element gives rise to any relevant difference of principle. It appears to me that to hold that the home is not a hospital is not only irreconcilable with the opinions of Lord Blades and the Lord President which I have cited, but is also irreconcilable with the actual decision in that case. The decision is not, of course, binding upon us, but it is deserving of the greatest respect and consideration, and, in my respectful judgment, the decision was right.

---

[1] Unreported.

Upon the view which I have expressed as to the construction of the relevant definitions, it is unnecessary to consider the alternative point upon which the appellant relied, namely, that even if "treatment" should be confined in the definition of "hospital" to medical or dental treatment, there is in fact a sufficiency of palliative treatment given in the home to bring it within the definition.

For the reasons which I have explained, I find myself unable to agree with the conclusions at which the arbitrator and Vaisey J. arrived, and I would allow the appeal.

Appeal allowed.
No order as to costs of the arbitration. Party and party costs of hearing before Vaisey J. and appeal to be paid by appellants, excluding certain special items which were before the arbitrator.
Leave to appeal to House of Lords.

Solicitors: *Solicitor, Ministry of Health; Farrer & Co., for Field & Sons, Leamington Spa.*

E. D.

CHURCH OF ENGLAND BUILDING SOCIETY v. PISKOR AND OTHERS.

C. A.
1954
Mar. 22, 23, 24, 26.
Evershed M.R., Birkett and Romer L.JJ.

[1952 C. No. 3292.]

Mortgage—Landlord and tenant—Letting by contracting purchasers—Subsequent completion of purchase—Legal charge to raise purchase-money—Whether completion and charge one transaction—Tenancy by estoppel as against mortgagees—Rent restriction.
Landlord and Tenant—Mortgage.

In September, 1946, the borrowers agreed to purchase leasehold premises which were within the protection of the Rent Restriction Acts; and in October, before completion, they were let into possession of the premises. The borrowers then purported to grant weekly tenancies of parts of the premises to other persons. On November 25, 1946, the purchase was completed, the premises being assigned to the borrowers who, on the same day, charged them by way of legal mortgage in favour of the plaintiff building society. The charge contained a statement that the premises were vested in the borrowers free from incumbrances for the unexpired residue of the term, and the power of leasing conferred by section 99 (1) of the Law of Property Act, 1925, was excluded. The plaintiffs sought an order for possession:—

Held, that the assignment to the borrowers and the legal charge to the plaintiffs could not be regarded as one indivisible transaction —for a moment of time a legal interest in the premises had vested of necessity in the borrowers before they could execute a legal charge in favour of the plaintiffs; and that the estoppel created in favour of the tenants was fed by the legal estate which had vested in the borrowers, and the tenants' rights took priority over the rights of the plaintiffs under the legal charge, who accordingly were not entitled to possession as against the tenants.

Woolwich Equitable Building Society v. *Marshall* [1952] Ch. 1; [1951] 2 All E.R. 769; and *Universal Permanent Building Society* v. *Cooke* [1952] Ch. 95; [1951] 2 All E.R. 893 considered.

In re Connolly Brothers Ld. (*No.* 2) [1912] 2 Ch. 25 considered and distinguished.

Observations of Harman J. in *Coventry Permanent Economic Building Society* v. *Jones* [1951] 1 T.L.R. 739; [1951] 1 All E.R. 901 disapproved.

Decision of Vaisey J. affirmed.

APPEAL from Vaisey J.

In September, 1946, General Piskor and the defendants Mrs. Piskor and J. Z. Sala agreed to purchase for £2,800 from a Mr. and Mrs. Bunbury No. 32, Harold Road, Croydon, for the residue of a term of 99 years granted by a lease of June, 1891. The premises were in an area of compulsory registration, but they were not registered as this was the first dealing. In October, 1946, the vendors moved out of the premises and on payment of the sum of £800, part of the purchase-moneys, the purchasers were allowed to take possession. They moved into part of the premises themselves and granted weekly tenancies of other parts. Tenancies were granted to the defendant, Mrs. Gibbons, and to a Captain Hamilton, who went into possession of the parts of the premises let to them early in November, 1946.

On November 25, 1946, the purchase was completed by an assignment of the lease to the purchasers. On the same day they executed a legal charge of the premises in favour of the plaintiffs, the Church of England Building Society, to secure £1,600. The charge contained a statement that the property "is "now vested in the mortgagors free from incumbrances for the "unexpired residue of the term." It was also provided that the power of leasing conferred by section 99 (1) of the Law of Property Act, 1925, should not apply. The circumstances in which the legal charge was executed are more fully stated in the judgment of Evershed M.R. The unpaid balance of the purchase-money was secured by a second mortgage in favour of the vendors. After the completion Captain Hamilton sublet one of the rooms which had been let to him to the defendant, Miss Eveline Mary Hunnex. At a later period he left the premises, Miss Hunnex remaining as tenant in occupation of her room. The second mortgage was subsequently transferred to the plaintiffs.

By this summons the plaintiffs, as mortgagees, claimed possession. The defendants to the summons were Mrs. Piskor and J. Z. Sala, the mortgagors, Mrs. Gibbons, a Miss Krum, who claimed to be a tenant, and Miss Hunnex. General Piskor, one of the mortgagors, was dead at the date of the issue of the summons. Vaisey J. made an order for possession against Mrs. Piskor, J. Z. Sala and Miss Krum, but he refused to make any order against Mrs. Gibbons and Miss Hunnex, holding that their tenancies were binding on the plaintiffs.

The plaintiffs appealed. Mrs. Gibbons had given up possession and the only respondent to the appeal was Miss Hunnex.

Harold Lightman for the plaintiff building society. The plaintiffs rely on the decision of Harman J. in *Coventry Permanent Economic Building Society* v. *Jones*,[1] that, where a purchaser immediately on completion mortgages the premises which he has purchased to a mortgagee who has advanced the purchase-money, the conveyance to the purchaser and the mortgage must be regarded as one transaction and there is no such scintilla temporis between the conveyance and mortgage as would enable the estoppel in favour of a tenant to be fed so as to confer on a tenant a legal estate having priority to the estate of the mortgagee. Vaisey J. followed the decision of Danckwerts J. in *Woolwich Equitable Building Society* v. *Marshall*[2] and held that the statement in the mortgage that the purchaser was the estate owner

---

[1] [1951] 1 T.L.R. 793; [1951] 1 All E.R. 901.

[2] [1952] Ch. 1; [1951] 2 All E.R. 769.

C. A.
1954

CHURCH OF ENGLAND BUILDING SOCIETY *v.* PISKOR.

estopped the plaintiffs from saying that there was no scintilla temporis between the conveyance and the mortgage. Where part of the purchase price is provided by a mortgage, all that the purchaser acquires is the equity of redemption. The assignment and mortgage of November 25, 1946, were in fact one transaction. It is normal to insert a recital of the borrower's title in a mortgage to show that he has power to mortgage: see Coote on Mortgages, 4th ed., p. 1377. The recital had no effect; no one's position was altered by reason of its insertion. Harman J.'s decision is supported by the decision in *In re Connolly Brothers Ld.* (*No.* 2).[3] The decision of the Court of Appeal in *Universal Permanent Building Society* v. *Cooke* [4] suggests that in every case it is a question of fact whether a conveyance and mortgage are one transaction or two.

[ROMER L.J. referred to *Greer* v. *Kettel.*[5]]

The evidence shows that here the assignment and mortgage were one transaction. The moneys advanced by the plaintiffs were paid direct to the vendors. The plaintiffs' bargain with the purchasers was that an unincumbered estate should be charged in their favour. The purchasers acquired no legal estate until delivery of the assignment: *Wilson* v. *Kelland.*[6] Further, the property was in an area of compulsory registration of title. Until registration no legal estate passed to the purchasers: sections 19 and 123 (1) of the Land Registration Act, 1925, and Land Registration Rules, 1925, rr. 72, 73. The purchasers accordingly did not acquire the legal estate before the execution of the mortgage.

F. B. Alcock for Miss Hunnex. First, in a normal case where a man purchases land with the assistance of a mortgage, there must be a moment of time in which the legal estate is in the purchaser in order to enable him to pass a legal estate to his mortgagee. In such circumstances a tenancy by estoppel is created in favour of a tenant to whom the purchaser purported to grant a tenancy before completion of his purchase. The conveyance and the mortgage are not one transaction. Harman J. was wrong in stating that, until a vendor receives the purchase-money, no legal estate passes to the purchaser. The decision in *In re Connolly Brothers Ld.* (*No.* 2) [7] was a case of competing equities and is no authority in a case such as this, which is concerned with legal estates.

---

[3] [1912] 2 Ch. 25.

[4] [1952] Ch. 95; [1951] 2 All E.R. 893.

[5] [1938] A.C. 156.

[6] [1910] 2 Ch. 306.

[7] [1912] 2 Ch. 25.

Secondly, where a mortgage contains a recital that the borrower is the estate owner, the mortgagee cannot object to the correctness of the recital. Such a recital is inserted by the mortgagee at his peril, and it binds him. It is a circumstance of evidence to be taken into account in deciding whether there was a scintilla temporis between the conveyance and the mortgage. [Reference was made to *Cuthbertson* v. *Irving*.[8]] Vaisey J. was right in holding that the tenancy of Miss Hunnex took priority over the plaintiffs' mortgage.

Harold Lightman, in reply, referred to *Mornington Permanent Building Society* v. *Kenway*[9] and *Meux* v. *Smith*.[10]

Cur. adv. vult.

March 26. The following judgments were delivered.

EVERSHED M.R. This case belongs to a series relating to building society mortgages, of which *Coventry Permanent Economic Building Society* v. *Jones*,[1] decided by Harman J., may be said to be the first, and which also includes *Woolwich Equitable Building Society* v. *Marshall*,[2] decided by Danckwerts J., and the case in this court of *Universal Permanent Building Society* v. *Cooke*.[3]

The action is a mortgagees' action for possession; the plaintiffs sue as legal chargees of a leasehold property, No. 32, Harold Road, Croydon, held for a term of 99 years from Christmas, 1889. The legal charge is dated November 25, 1946, that being the same date as is borne by the assignment to the mortgagors or chargors. The mortgagors were two persons of the name of Piskor and one Sala, the sum secured being £1,600. The property charged was described in the schedule to the legal charge, and that schedule contains the words, after defining the property, "now vested in "the mortgagors free from incumbrances for the unexpired "residue of the term."

The property is in what is called a compulsory registration area, but I am satisfied that nothing turns on that fact. The purchase by the mortgagors and the legal charge were in fact the first dealings with the property since the area had been made a

---

[8] (1859) 4 H. & N. 742.

[9] [1953] Ch. 382; [1953] 1 All E.R. 951.

[10] (1843) 11 Sim. 410.

[1] [1951] 1 T.L.R. 739; [1951] 1 All E.R. 901.

[2] [1952] Ch. 1; [1951] 2 All E.R. 769.

[3] [1952] Ch. 95; [1951] 2 All E.R 893.

C. A.
1954

CHURCH OF ENGLAND BUILDING SOCIETY
v.
PISKOR.

Evershed M.R.

compulsory registration area. Mr. Alcock suggested an argument by way of analogy based on the Land Registration Act, 1925, and the rules made thereunder, but, in my judgment, the solution of the question with which we are concerned is not materially assisted by that analogy. The real question is a short one.

[His Lordship stated the facts and continued:] For the purposes of this appeal it has been conceded by Mr. Lightman that Miss Hunnex must be treated as being in the same position as Captain Hamilton would have been; Captain Hamilton had a contractual tenancy under which he had taken possession prior to the date of the mortgage. The plaintiffs apparently made no inquiry as to the state of the premises at the time they advanced their money, and the question is whether the mortgage or legal charge which they took is subject to the rights that Miss Hunnex must be taken to have acquired in the shoes, so to speak, of Captain Hamilton. I may add that, apart from the impact of the Rent Restriction legislation, there would be nothing of substance in the point. Whatever the terms of the tenancy may be, it is admittedly, so far as I understand it, only a weekly tenancy, and if Miss Hunnex or Captain Hamilton had any interest in possession (that is, a tenancy), when the mortgage took effect, then the mortgagees could, in the ordinary course, have given notice to determine that tenancy by a notice to quit. But as things are, Miss Hunnex, if she has such an interest as I have described, is also admittedly entitled to the protection of the Rent Acts and therefore can be removed only by the appropriate proceedings in compliance with the provisions of those Acts. I have already stated the question to be determined; and I will restate it in another form; that is, whether the plaintiffs, as they now say, can eject Miss Hunnex on the ground that they have a legal title paramount to her interest.

Question

From what I have said, it is clear that as between the mortgagors and Captain Hamilton (and I will henceforth speak of Captain Hamilton, treating him and Miss Hunnex as equivalent) there was created a tenancy by estoppel. So much is not contested, although the facts about the creation of that tenancy are somewhat vague. If, then, the mortgagors acquired a legal estate before the legal charge took effect, for however short a time, then the estoppel would, as it is said, be fed and the plaintiffs' claim must necessarily be defeated. This much was decided by this court in the *Universal Building Society* case,[4] where, on the facts, there was an interval of one day between the date of the conveyance to the mortgagors and the date of the mortgage; and there was no evidence to suggest that these deeds did not take effect according to their terms or on their apparent dates. Here, however, the date of the deed and the date of the legal charge and the assignment is the same; on the other hand, there is the recital in the schedule to the legal charge. Thus, following in this respect the decision of Danckwerts J. in the *Woolwich* case,[5] the mortgagees may well be said to be unable to complain of the truth of the recital which they no doubt caused to be inserted in their own mortgage; in other words, on the facts of this case, it is said that the result must be the same as in the *Woolwich* case,[5] assuming that case to have been rightly decided.

---

[4] [1952] Ch. 95.

Those last words raise the larger question, namely, whether in truth and notwithstanding the recitals in the mortgage the transaction—and I use deliberately the word chosen by Mr. Lightman—of the sale to the mortgagors and the mortgage is in truth all one transaction; with the result that there is in truth no scintilla temporis during which the mortgagors had any legal estate, or rather, had any legal estate prior to the legal estate of the mortgagee. This was the conclusion which Harman J. reached in the *Coventry* case,[6] and the question has been argued in this case whether Harman J.'s view was correct.

Mr. Lightman very properly reminded us that in the later case in this court, the *Universal* case,[7] I myself—although expressing no opinion, because it was unnecessary to do so, on the validity of Harman J.'s judgment—used the phrase that it had obviously an appeal to common sense.

I first draw attention to certain special circumstances in the *Coventry* case [8] without taking up time with a long recital of the facts, because they are sufficiently set out in the headnote. It is to be observed that the mortgagors there, in granting the relevant tenancy, quite deliberately broke their word with the proposing lenders. The judge used the words: "The lenders or mortgagees "had been defrauded." It is far from clear to me, on reading the facts, that the tenants themselves were not also participes criminis and did not know perfectly well what promises had been given to the lenders. Thirdly, according to the reported facts of the case, there was no recital in the legal charge or mortgage corresponding to that which appeared in Danckwerts J.'s case and to that which appears in the present case.

[5] [1952] Ch. 1.

[6] [1951] 1 All E.R. 901, 903.

[7] [1952] Ch. 95.

[8] [1951] 1 All E.R. 901.

C. A.
1954

CHURCH OF ENGLAND BUILDING SOCIETY *v.* PISKOR.

Evershed M.R.

Mr. Lightman referred us to certain passages from the affidavits in the present case, which are numerous, and I think that I ought to make one brief reference to what was said by the assistant secretary of the plaintiffs, a Mr. Groves, in his affidavit which was filed on June 22, 1953: "The legal charge dated November "25, 1946 . . . was completed at the same time as and was in "substance part of the one transaction whereby the original "defendants"—that is, the mortgagors—"secured an assignment of the leasehold land and premises known as 32, Harold "Road, Upper Norwood . . . from the vendors"—Mr. and Mrs. Bunbury—"But for the moneys advanced to the plaintiffs on the "security of the said legal charge the vendors would not have "delivered any assignment of the said property. The sum of "£1,600 advanced by way of mortgage was paid to the vendors," and there follows a reference to the registration.

Later in the affidavit he said: "The solicitors who acted for "the mortgagors also acted for the vendors of the leasehold "interest (Mr. and Mrs. Bunbury). In answer to question 1 "in the requisitions on title it was represented by the vendors" —that is, Mr. and Mrs. Bunbury—"that the property was not "let and that it was not thought that there was any standard "rent, as the property had been in the possession of the then "owners since 1928. I should, however, point out that the "application for an advance on mortgage was dated August 12, "1946"—that is, before the contract—"and the answers to "the requisitions on title were dated September 24, 1946." I add, recalling what I have already said, that the arrangement whereby the purchasers went into possession and were granted the various tenancies took place later still, in October and November. There was on the evidence no case for saying that there was any defrauding by the purchasers, so far as I can see, and certainly no evidence to suggest that Captain Hamilton or Miss Hunnex were other than entirely innocent of any deception.

I think that the facts distinguish the present case from that which was decided by Harman J. In the course of his judgment Harman J. said[9]: "The question is whether I must assume "the scintilla temporis and assume that because of the obligations "of the landlord she must be held to have defrauded her mortgagee by creating a tenancy which is good against the society "although it was not willing to lend the money except on the "footing that she had no such right. I do not see why I need

---

[9] [1951] 1 All E.R. 903.

"postulate this. The whole transaction was one transaction. "The vendor would not sell without receiving his purchase-money, "and the mortgagee would not provide the purchase-money without receiving the term of years. The money, in fact, went "straight—as is the universal practice—from the mortgagee to "the vendor, and not until it was in the vendor's hands would "a legal estate be created either in favour of the landlord or of "the mortgagee. It seems to me that the whole thing is one "transaction in substance, and I am not constrained to introduce "an artificiality so as to affect the rights of the building society."

On the facts of the case, I think that Harman J.'s conclusion may well be in any circumstances justified; since, if I am right in my inferences, all the parties, including the tenants, were well aware of the representation which was made. The tenant's occupation being (as the judge said) in fraud of the lenders, it may well be that the tenant could not be heard to plead his own fraud —that is the fact essential to his tenancy. But since the broader point has also been argued, I will express my opinion upon it, which is briefly that, at any rate in a case such as the present, the transaction, although it may fairly be said to be one in substance, still cannot be said in the eyes of the law to be one and indivisible.

The claim of the plaintiffs to a title paramount rests essentially upon their having obtained a legal estate, and this they can only have done by virtue of the legal charge on which they sue; and if for some moment of time the legal estate was vested in the mortgagors and was therefore capable of being subjected by them to the charge upon which the mortgagees rely—if that is right, then it seems inevitable that the estoppel, which was involved in the tenancy created in favour of Captain Hamilton, necessarily is fed by the legal estate in the hands of the mortgagors; in other words, I am not satisfied, with all respect to Harman J., that if the language which I have read was meant to lay down a general proposition covering all cases of this kind, it was correct.

It is no doubt true to say that in one sense the transaction was one transaction; but it is equally true to say that it consists necessarily of certain defined steps which must take place in a certain defined order, if the result intended is eventually to be achieved. That seems to me not an artificiality, but a necessary result of the law and of the conveyancing practice which was involved.

I would add also that I do not think that Harman J. was right (and no authority has been cited to support his view) that no legal estate would be created in favour of the mortgagor or mortgagee until the purchase-money had in fact reached the vendors' hands.

I therefore agree with, and adopt, the language which Danckwerts J. used in the *Woolwich* case,[10] in a short paragraph, both limbs of which I think are applicable in the present case. Danckwerts J. said[11]: "It seems to me that a mortgagee, who has "inserted in the deed under which he acquires title a statement "that the mortgagor is 'the estate owner in respect of the "'property' which is being mortgaged or charged to the mortgagee, cannot object if that statement is taken to be true. "Therefore, it seems to me that the irresistible inference is that "I must assume that to be the position, even if the transfer by "the vendors to the purchaser bore the same date as the "charge." He continued: "In fact, the transfer must have "been executed at a time earlier than that at which the charge "to the society was executed; so that there was a time in which "it would be correct to say that the mortgagor had become the "estate owner, that is, the legal owner of the fee simple of the "property subsequently charged by him to the society to secure "the amount of his loan."

Mr. Lightman drew our attention to an earlier decision of this court in the year 1912, which was not cited when the *Coventry* case[12] came before Harman J. Its apparent relevance was first noted by Vaisey J. in another later case, *Mornington Permanent Building Society* v. *Kenway*.[13] The case to which I allude is *In re Connolly Brothers Ld.* (*No.* 2).[14] In my judgment, however, that case does not justify the general conclusion of Harman J.

Briefly, the facts in that case were that Connolly Brothers Ld. had issued debentures charging the whole of their property by way of floating charge in the ordinary course. By the material date that charge had not crystallized. The company then proceeded to negotiate for the purchase of certain property and were only in a position to acquire the property if the bulk of the purchase price was provided by a certain third party. The same solicitors acted for all parties, the vendor, the lender (a Mrs. O'Reilly) and the company; the recitals of fact in the Law Reports are, I think, of importance and ought to be read: "They"—that is, the company—"accordingly applied to one Mrs. O'Reilly to advance "the sum of £1,000 for the purpose of enabling them to purchase

---

[10] [1952] Ch. 1.

[11] Ibid. 9.

[12] [1951] 1 All E.R. 901.

[13] [1953] Ch. 382; [1953] 1 All E.R. 951.

[14] [1912] 2 Ch. 25.

" the property, and agreed to give her a charge upon the property " so purchased to secure the sum to be advanced by her, and she " consented to make the advance on those terms. The company " thereupon entered into a contract for the purchase of the " property for the sum of £1,100 and paid a deposit of £150, " leaving £950 of the purchase-money unpaid. The contract was " to be completed on March 31, 1904, and on that day Mrs. " O'Reilly was present at the completion and drew a cheque " for £1,000 in favour of the company, into whose banking " account it was paid. The company then drew a cheque for " £950, which was cashed, and on the completion of the purchase " that cash was handed over to the vendor. Upon this transaction Mr. Mercer, the vendor's solicitor, acted both for the " company and for Mrs. O'Reilly. He knew of the arrangement " between her and the company, and on the conveyance being " executed he retained the deeds on her behalf."

On what I have read it is, I think, apparent that the question betweeen Mrs. O'Reilly and the debenture-holders was a question of equitable priorities. There is no question that the company acquired the legal estate; the question was whether they acquired it and held it for some time free of any charge in favour of Mrs. O'Reilly, so that the equitable charge of the debenture-holders would take priority over Mrs. O'Reilly's equity. It was held, particularly in the light of the specific agreement which I have read, that Mrs. O'Reilly's equity had priority, and, although the company took the legal estate, they took it subject to Mrs. O'Reilly's equity, which sprang into existence eo instanti as the legal estate passed to the company; and therefore, on the facts stated, the company never acquired any estate free from the equitable right of Mrs. O'Reilly, so that the charge of the debenture-holders only took effect on what the company themselves took; that is to say, it was subject to Mrs. O'Reilly's prior charge which took priority over that of the debenture-holders. It is true that Sir H. Cozens-Hardy M.R. in his judgment said: " In " my opinion we should be shutting our eyes to the real transaction if we were to hold that the unincumbered fee simple in " the property was ever in the company so that it became subject " to the charge of the debenture-holders." But I do not think that that language, appropriate to a case of competing equities, can be used to justify the view that there is one transaction—one, that is, not only in substance but in law one and indivisible—in a case such as the present.

C. A.
1954

Church of England Building Society v. Piskor.

Evershed M.R.

In re Connolly Brothers Ld. (*No.* 2)[14] followed (and the judges were referred to) an earlier case, that of *Meux* v. *Smith*,[15] which was of the same kind, that is to say, equally involved, but only involved a conflict of equities. I shall not, therefore, take up further time discussing that earlier case.

One other point was taken by Mr. Lightman; that was this: I have said that of the total purchase price of £2,800, £800 was paid in October, £1,600 was advanced by the building society, and the remainder, £400, was allowed to remain on second mortgage by the vendors, the vendors taking a second charge. It was said by Mr. Lightman that, by taking a second charge, the vendors gave up their vendors' lien (as they in fact did); but, further, that the plaintiffs in some way were subrogated to the vendors' lien, so as to give to the plaintiffs via Mr. and Mrs. Bunbury the benefit of the vendors' lien and thereby a title paramount, effective against Miss Hunnex or Captain Hamilton. I cannot accept that argument—I do not know that I have in all respects followed it. The fact is that the vendors did take a second mortgage, but that fact does not seem to me to be otherwise material to the present question.

For the reasons I have stated at a little length because of the careful consideration which it has been necessary to give to Harman J.'s view in the *Coventry* case,[16] I think that this appeal fails and that Vaisey J. rightly refused to make an order for possession against Miss Hunnex.

I should add that Birkett L.J. has authorized me to say that he agrees with the judgment I have just delivered.

Romer L.J. I agree. The theory that a purchase, which is completed by payment of money which has been provided in part by a third party, and a mortgage by the purchaser of the property sold to secure the repayment of that money to the lender, constitutes only one transaction, if the instruments are executed at more or less the same time, is a conception which has a prima facie appeal, but it does not, on analysis, in my opinion, truly reflect the legal effect of what takes place. The mortgage of the purchased property cannot have any operation in law (whatever rights it may give rise to in equity or by estoppel) unless and until the purchaser is in a position to vest a legal term in the property, as security, in the mortgagee, and he is not and cannot be in a position to do this until he himself has acquired from the vendor the legal estate out of which the mortgage term is capable of being created. From this it follows that the execution and delivery of the conveyance (if the property is freehold) or of the assignment (in the case of a leasehold) by the vendor to the purchaser must of necessity constitute an essential preliminary to the vesting in the mortgagee of a subsidiary interest in the property. Mr. Lightman pressed upon us the necessity of looking at the substance rather than the form of the transaction which took place in the present case and referred us to such cases as *Meux* v. *Smith* [17] in support of that proposition. I am very willing to do so, but the substance of the transaction was that the purchasers were to purchase property with money lent in part by the building society and give the society a mortgage on the property for the loan. All this has in fact been done and the society has got its security but, look at it how one will, the fact remains that the purchasers could not have given the society the legal charge which the society required unless, at the time when the charge was executed, the purchasers were the owners of the legal interest in the property charged. That this was recognized by the society itself is sufficiently shown by the fact that there appears in the schedule to the charge the statement that the premises were then (that is to say, at the moment of the delivery of the charge) vested in the mortgagors—a circumstance of evidence upon which Danckwerts J. relied in *Woolwich Equitable Building Society* v. *Marshall.*[18] I agree with Danckwerts J. that the plaintiffs, having inserted that statement in the charge, cannot very well complain if the statement is regarded as true. Even without this element, however, I should still regard the legal interest in the purchased premises as having become vested in the purchasers prior to the execution of the charge for, as I say, unless this sequence of interests is observed, the charge would have been wholly ineffective in law to achieve its immediate purpose. I agree with Mr. Alcock's submission that a composite transaction cannot be regarded as being one transaction, unless it is not only one but one and indivisible; and that two transactions, each possessing a legal individuality of its own, do not coalesce into one merely because they are dependent on each other.

---

[14] [1912] 2 Ch. 25.

[15] (1843) 11 Sim. 410.

[16] [1951] 1 All E.R. 901.

The whole object of the plaintiffs in trying to displace the view which is both logical and in conformity with conveyancing practice, namely, that the completion of the purchase preceded by however short a time the execution and delivery of the mortgage, is to defeat the claim of the sitting tenants. But for the Rent Restriction Acts the point would have had no importance and would, I suppose, never have been taken at all, for the society could have determined the tenancies by the service of notices to quit; and I find myself unable to treat as one what were, in law, two palpably distinct transactions merely for the purpose of enabling the society to evict persons, who were already in occupation, but whose existence or rights the society had never troubled to inquire about at all.

---

[17] 11 Sim. 410.

[18] [1952] Ch. 1.

To the extent, then, that the view which Harman J. acted upon in the *Coventry Building Society* case [19] was founded on the principle that in cases such as the present the conveyance and the mortgage are to be regarded as one transaction, I do not, for myself, now that the matter has been so fully argued before us, feel able to accept it.

I rather gathered from Mr. Lightman that, if we were against him upon this question, he would feel a difficulty in further pursuing the appeal. He did, however, suggest that the decision of this court in *In re Connolly Brothers Ld.* (*No.* 2) [20] assisted him upon the hypothesis that the purchasers in the present case had, previously to the sale, entered into an immediately binding agreement to give the plaintiffs a charge upon the property, when assigned, to secure the money which they were proposing to advance. As to this, it seems to me, as at present advised, that, if such an agreement had been made after the tenancies had been granted, the legal estate which passed to the purchasers, subject to the equity in favour of the plaintiffs arising from the agreement, would have sufficed to feed the estoppel in favour of the tenants. As, however, there is no evidence of such an agreement having been entered into, whether before or after the tenancies were granted, the point does not arise, and I express no concluded opinion upon it.

For the above reasons, and those given by the Master of the Rolls, I agree that the appeal should be dismissed.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors: *Dennes & Co.; Peacock & Goddard.*

B. A. B.

---

[19] [1951] 1 All E.R. 901.

[20] [1912] 2 Ch. 25.

In re JOYNSON'S WILL TRUSTS.
GADDUM *v.* INLAND REVENUE COMMISSIONERS AND OTHERS.

1954
Apr. 29.

Danckwerts J.

[1953 J. No. 4800.]

Revenue — Estate duty — Surrender of life interest — Duty on released property—Trustee's accountability—Property remaining in settlement accountable for duty—Lien—"Property" deemed to pass on death—£25,000 released—Investments handed over—Finance Act, 1940 (3 *&* 4 *Geo.* 6, *c.* 29), *s.* 43 (1)—*Finance Act,* 1950 (14 *Geo.* 6, *c.* 15), *s.* 44 (1), (3), (4).

By his will dated May 7, 1908, a testator settled a legacy of £100,000 on his daughter B. for life with a power of appointment among her children and remoter issue. He died on June 12, 1908. By a deed of appointment dated December 1, 1947, B. appointed £25,000 of the settled fund in favour of her elder son and his issue, and she declared by clause 3 of the deed that she thereby released "her life interest in the . . . sums of £20,000 and £5,000." These sums were resettled by two settlements dated December 1, 1947. By her will dated March 2, 1948, B. appointed the remainder of the trust fund to her daughter for life with remainders over.

B. died on January 17, 1952. It was not disputed that estate duty was leviable on the property released in 1947 under section 43 of the Finance Act, 1940, but the Inland Revenue Commissioners claimed that the trustees of the original trust fund were, by reason of section 44 (1) of the Finance Act, 1950, liable to account for that duty out of the balance of the settled funds remaining in their hands, and that they had a lien under subsection (4) of section 44 on the property for that purpose; the claim was without prejudice to the trustees' right to recoupment out of the released property.

The court was asked to determine whether the trustees were liable to account for the duty under section 44, and, if they were so liable, to what property the liability attached, namely, whether on the sum of £25,000; on the investments which were handed over in 1947, or on the assets at the death of B. representing the released property: —

Held, (1) that "settlement" in section 44 meant the original settlement of the legacy of £100,000, and the contention of the commissioners that the trustees of that settlement must account for the duty was therefore correct; (2) that estate duty under section 43 was payable on the sum of £25,000, since that sum was what, under the terms of the deed of release in 1947, was actually released from the settlement.

Iveagh v. *Inland Revenue Commissioners,* ante, 364; [1954] 1 All E.R. 609 distinguished.

ADJOURNED SUMMONS.

The plaintiffs were the present trustees of a legacy of £100,000 settled by the will of Richard Hampson Joynson, and they asked

1954

JOYNSON'S WILL TRUSTS, *In re.* GADDUM *v.* INLAND REVENUE COMMISSIONERS.

the court on this summons to determine whether, on the true construction of section 44 of the Finance Act, 1950,[1] they were accountable for estate duty payable on property released from the settlement less than five years before the death of the tenant for life of the legacy; and if they were so accountable, whether they had a lien for that purpose on the balance of the settled legacy remaining in their hands.

Richard Hampson Joynson, by his will dated May 7, 1908, settled a legacy of £100,000 on trust for his daughter (afterwards Lady Brentford) for life, with a power of appointment by deed or will in favour of her children or remoter issue, and a trust, in default of appointment, in favour of children who attained 21, or being daughters attained 21 or married under that age. The testator died on June 12, 1908.

---

[1] Finance Act, 1950, s. 44: "(1) "Where an interest limited to cease "on a death (within the meaning of "section 43 of the Finance Act, "1940) after becoming an interest "in possession is disposed of or "determines wholly or partly, then, "whatever the nature of the property "in which the interest subsisted, the "following persons shall be accountable for any estate duty payable on "the death by virtue of that section "(in addition to any persons accountable therefor apart from this section), that is to say:—(*a*) if the "settlement under which the interest "subsisted is in existence at the "death, the trustees for the time "being of that settlement; . . . "(3) where—(*a*) the trustees of a "settlement may become accountable "for estate duty payable by virtue "of the said section 43 in respect of "any property; and (*b*) it is intended "that the property or any part thereof shall cease to be comprised in "the settlement; then if the trustees "obtain from the Commissioners a certificate of the amount which in the "opinion of the Commissioners may "properly be treated as the prospective amount of the duty, and give "the Commissioners all the information and evidence required by the "Commissioners in connexion with "the application for the certificate, "no person shall be accountable as "trustee of the settlement for the "duty to which the certificate relates "to an amount in excess of the "amount certified. (4) . . . a person who may become accountable "as trustee of a settlement for estate "duty payable by virtue of the said "section 43 on property which is or "has been comprised in the settlement has a lien for the prospective "amount of the duty and the costs "in respect thereof on any property "in his hands which is so comprised."

Finance Act, 1940, s. 43 (as amended by Sch. VII, Pt. II of the Finance Act, 1950): "(1) Subject to "the provisions of this section, where "an interest limited to cease on a "death has been disposed of or "has determined, whether by surrender, assurance, divesting, forfeiture or in any other manner . . . "whether wholly or partly, and "whether for value or not, after becoming an interest in possession, "and the disposition or determination (or any of them if there are "more than one) is not excepted by "subsection (2) of this section, then— "(*a*) if, had there been no disposition "or determination as aforesaid of that "interest and no disposition of any "interest expectant upon or subject "to that interest, the property in "which the interest subsisted would "have passed on the death under "section 1 of the Finance Act, 1894, "that property shall be deemed by "virtue of this section to be included "as to the whole thereof in the "property passing on the death. . . ."

On December 1, 1947, Lady Brentford, by a deed of appointment, released her interest in the settled legacy to the extent of £25,000. She had three children, who were all parties to this deed because she wished to exercise her power of appointment in favour of her son, Lord Brentford, and his issue, in a manner which was excessive having regard to the terms of the power.

The deed of appointment recited: "The appointor is now "desirous of making an appointment of £20,000 out of the trust "fund for the benefit of Lord Brentford and his successors in the "said Viscounty and the spouses and issue of such successors "and a further appointment of £5,000," similarly for the benefit of Lord Brentford.

Clause 2 of the deed provided: " . . . the appointor in "exercise of the recited power . . . hereby irrevocably appoints "that the will trustees shall . . . hold the sum of £20,000 (part "of the . . . sum of £25,000) upon trust to transfer the same to "the settlement trustees to be held by them . . . upon the trusts "to be declared in the said intended settlement . . . marked A "and the appointor further appoints that the remaining sum of "£5,000 (part of the . . . sum of £25,000) shall be held by the "will trustees . . . upon trust to transfer the same to the "settlement trustees to be held by them . . . upon the trusts to "be declared in the said intended settlement . . . marked B."

Clause 3 provided: "The appointor hereby releases her life "interest in the said sums of £20,000 and £5,000."

By clause 4 the appointor and her children directed the trustees of the will "forthwith to raise and pay to the settlement "trustees the said sums of £20,000 and £5,000 to be held by "them as aforesaid."

Settlement A contained wide powers of investment, and settlement B contained a power to advance capital to Lord Brentford in certain events.

The sums of £20,000 and £5,000 were satisfied partly by transfer of investments and party by payments of cash raised out of the legacy of £100,000. Other sums representing part of that legacy were subsequently raised and paid by way of advancement in the lifetime of Lady Brentford; and when she died the unappointed residue of the legacy of £100,000 was about £25,000.

Lady Brentford, by her will dated March 2, 1948, gave certain legacies and annuities, and after payment of the legacies she provided for the payment of duty out of her free estate on the funds appointed in 1947. The balance of the settled legacy was appointed under the will to her daughter, the second defendant, for life with remainder to a certain class of her issue, and, in the event of there being no issue, to the younger son of Lady Brentford, the third defendant.

Lady Brentford died on January 17, 1952. Her free estate at the date of her death was not sufficient to provide for the duty on the funds appointed in 1947.

A claim was made by the Inland Revenue Commissioners for estate duty at 50 per cent. on the two funds settled in 1947 against the present trustees of the will, who were the plaintiffs, and the third defendant.

E. I. Goulding for the plaintiffs.

Geoffrey Cross Q.C. and *J. H. Stamp* for the Inland Revenue Commissioners. The question is not as to the liability for estate duty, but the accountability of the trustees of the testator's will. The Crown relies on section 44 of the Finance Act, 1950, and section 8 (4) of the Finance Act, 1894; principally on the former. The trustees are accountable under section 44 (1) of the Act of 1950 to pay the duty arising under section 43 of the Finance Act, 1940, out of the balance of the settled property remaining in their hands; and by subsection (4) of section 44 they have a lien on that property for that purpose. It is not suggested that the trustees have no right of recoupment from persons beneficially entitled to the property.

The settlement from which Lady Brentford released part of her interest in 1947 is still in existence, and the trustees of it are liable under subsection (1) of section 44 to account for the duty. The property released in 1947 is no longer "comprised in the "settlement," and these trustees are therefore accountable for the duty under section 43 on the property "which has been comprised in the settlement." Further, they have a lien under section 44 (4) on the property which is still in the settlement, that is, the balance of the settled legacy which remains in the hands of the trustees. The lien extends to any part of the property which remains in the settlement, and it is limited to that property.

The trustees' liability to account for the duty also arises under section 8 (4) of the Finance Act, 1894, as being persons in whom any interest in the property passing on the death "is at "any time vested" within the meaning of that section.

Under subsection (3) of section 44 the trustees may obtain a certificate stating the amount in respect of which they may become accountable on property taken out of the settlement, and in that case the Crown is entitled to a charge under section 9 of the Finance Act, 1894, on any property remaining in their hands up to the amount certified.

R. O. Wilberforce Q.C. for Lady Brentford's daughter. The trustees are not accountable for this duty; it would work great hardship if the balance of the settled property had to suffer this double charge; estate duty on its own value, and estate duty payable on the property released. It might be some time before effect could be given to the right of recoupment, and in the meantime considerable hardship might be suffered by the beneficiary entitled to the property remaining in the settlement.

The question is what is meant by the word "settlement" in section 44. It means the particular trusts affecting the particular items on which duty is levied, that is, the interest which has "been disposed of or determines" within the meaning of subsection (1) of section 44 and which attracts duty under section 43 of the Finance Act, 1940. The only property charged under section 43 is the £25,000 released from the settlement in 1947, and it is that property which is the settlement for the purpose of section 44 and accountable for the duty. The settlement no longer exists as to the property which was taken out in 1947. The position is referred to in Hanson on Death Duties, 9th ed., 5th Cum. Supplt., p. 140, note 3.

Different trustees are often appointed for different shares of settlement, and each set of trustees would be accountable for duty on their share.

The Crown also relied on section 8 (4) of the Finance Act, 1894, but it has never been decided that under that section trustees are liable for duty on property from which they have parted.

J. A. Gibson and *G. H. Newsom* for other persons interested were not concerned to argue the question.

DANCKWERTS J., having stated the facts, continued: The funds which were released in 1947 have been partly invested in a farm in South Africa, and are partly represented by a loan to Lord Brentford, who lives on that farm. Funds therefore are not readily available in respect of the estate duty payable on settlement A and settlement B. Hence, the importance of payment being made, if it should be made, out of the balance of the settled legacy of £100,000, which is available in the hands of the trustees of Mr. Joynson's will.

It is contended that, if necessary, the Revenue can rely upon the accountability of the trustees of Mr. Joynson's will under section 8 (4) of the Finance Act, 1894. They put their claim principally, however, under section 44 of the Finance Act, 1950. [His Lordship read section 44 (1), (3) and (4), and continued:]

It is contended by the Inland Revenue Commissioners that the settlement is in existence, and is the settlement of the legacy of £100,000 by the will of Mr. Joynson, and that "the trustees "for the time being of that settlement" are the present trustees of the will and, accordingly, the case falls within the terms of clause (*a*) of subsection (1). Subsection (2) contains a provision relating to the case of an advance to infants or to any person not absolutely entitled, and provides that if not more than one half of the settled fund has been advanced the trustees of the relevant settlement are protected, because any accountability is limited to the settled fund remaining in their hands. Subsection (3) makes provision for the trustees of a settlement to ascertain the maximum liability to which they may be accountable under that section. Under that subsection trustees, who fear that on the death of the life tenant in a case of this kind a claim for duty may be made, may get a certificate from the commissioners fixing the maximum amount for which the trustees will be afterwards asked to account when the tenant for life dies.

It was argued by Mr. Cross, on behalf of the Inland Revenue Commissioners, that a lien would be conferred on the trustees by virtue of section 9 of the Finance Act, 1894, on any fund which may be retained by them as a result of that certificate. But that was not an accurate submission, because the essence of the matter is, that until the life tenant dies—and the life tenant may live for more than five years from the date of the transaction which causes the liability to estate duty—there will be no liability or claim for duty by the commissioners, and it may result that no claim will arise.

The commissioners rely on subsection (4) of section 44, and they claim that by reason of that subsection the balance of the property settled by the will of Mr. Joynson and retained by the trustees (because it was not subject to the deed of appointment and settlements of 1947) is liable to be held by the trustees of Mr. Joynson's will subject to the lien conferred by subsection (4). It is claimed that the trustees are accountable under subsection (1), and can provide for their liability by exercising that lien.

It is obvious that in the circumstances of this case—and it may be in the circumstances of many others—very great hardship may be imposed on the beneficiaries who are interested in the balance of the fund, which has not been the subject of an arrangement attracting duty under section 43 of the Finance Act, 1940. Mr. Cross says that there is a liability to recoupment thrown upon the persons who were interested under the arrangement of 1947, and it may be that in the present case effect can be given to that liability to recoupment, if required; but one can conceive many cases in which the property of which there has been a surrender of the life interest, has been disposed of once and for all to persons who can never be made effectively liable to make any recoupment for estate duty in respect of the property which they have had. That is very hard on beneficiaries who, it may be, were no party to the arrangement, and who are interested in the balance left in the settlement. However, the fact that the result of the subsection is that hardship falls on innocent beneficiaries by the rights, monstrous or otherwise, conferred on the Inland Revenue by section 44 of the Finance Act, 1950, is not a relevant consideration. I have to consider what is the effect of the words to be found in the Act.

It has been argued by Mr. Wilberforce, on behalf of the daughter of the testatrix, the person interested in the balance of the £100,000 legacy, that "settlement" in this subsection means the settlements made in 1947 of a proportion of the original fund. I am afraid, however, that I must come to the conclusion that for the purposes of subsection (4) "the settlement" means the settlement of the fund of £100,000 by the will of Mr. Joynson, and consequently any part of that fund now remaining in the hands of the trustees of the will is property which is comprised in that settlement at the present time. It seems to me that it is unavoidable in the present case to reach the conclusion that subsection (4) confers on the trustees of Mr. Joynson's will a lien upon that part of the £100,000 which remains in their hands to meet the accountability under section 44 (1) of the Finance Act, 1950, for duty, imposed by section 43 of the Act of 1940. Accordingly, the question of hardship is not relevant, and the claim of the Inland Revenue is justified.

There will be declarations that the trustees, as trustees of Mr. Joynson's will, are liable for the duty in question, and that they are entitled for the purpose of paying the estate duty and interest and costs in respect thereof to have recourse to the balance of the settled legacy in their hands at the death of

1954

JOYNSON'S WILL TRUSTS, *In re.* GADDUM *v.* INLAND REVENUE COMMISSIONERS.

Lady Brentford appointed by her will, and the income of the balance which has accrued since her death.

Argument was then addressed on the question as to what was the property to which this liability to estate duty attached. The argument on this question appears sufficiently from the judgments.

DANCKWERTS J. The question which I now have to decide is what is the sum in respect of which duty is payable on the death of Lady Brentford, and for which the trustees of Mr. Joynson's will are accountable.

There are three possible views. One is that it is the sum of £25,000. The second is that it is the investments and money which were actually handed over as a result of the transaction of 1947 by the trustees of Mr. Joynson's will to the trustees of settlement A and settlement B. In the case of settlement A, the settlement of £20,000, the whole sum was satisfied by the handing over by the trustees of Mr. Joynson's will of investments, some of which had gone out of existence at the date of Lady Brentford's death by reason of certain vicissitudes. In the case of settlement B, £3,000 2½ per cent. Consolidated Stock and £2,480 cash, were handed over. Presumably, all the investments mentioned and the sum of £2,480 cash were part of the property actually held by the trustees of Mr. Joynson's will on the trusts of the settled legacy of £100,000. The third possibility is that, by reading section 43 of the Act of 1940 with the definition section 22 of the Act of 1894, the property to be taxed is the investments representing, at the date of Lady Brentford's death, the property handed over. The second would be most favourable to the interests of the beneficiaries in this case, because, as I have pointed out, a certain number of investments have passed out of existence, and it is possible that there would be no fund at the death of Lady Brentford which would be taxable at all, there being nothing in existence in respect of such investments. The third view has not been urged before me today (although the beneficiaries and the trustees wish to keep the point open in case the matter goes to appeal), because it is concluded adversely to them by the judgment of Upjohn J. in *Iveagh* v. *Inland Revenue Commissioners.*[1] The contest, therefore, seems to be plainly between contentions one and two.

---

[1] Ante, 364; [1954] 1 All E.R. 609.

The relevant section on which any conclusion must be based is section 43 of the Finance Act, 1940, as amended by the Finance Act, 1950. [His Lordship read section 43 (1) of the Finance Act, 1940, and continued:] The property which is to be included in the property passing under this notional passing, is therefore the property in which the interest subsisted; that is to say, in the present case it is the property in which Lady Brentford's interest subsisted.

An argument was put before me which at first seemed convincing, namely, that the property in which Lady Brentford had an interest and in which her interest ceased at the date of the documents of 1947, was the aggregate of the investments and cash which were, in fact, handed over to the trustees; so that it was that property which was referred to in paragraph (*a*) of section 43 (1) of the Act of 1940. When, however, one looks at what actually happened, it seems to me that that argument cannot succeed. It is true that Lady Brentford had an interest for her life in the property consisting of the investments included in the settlement of the £100,000 legacy and the cash, but the documents of 1947 must be examined to see what, in fact, was appointed and in what, in fact, Lady Brentford released her interest. When that is done, the answer is plain and conclusive. She did not appoint any particular investments forming part of the settled legacy, as was the case in *Iveagh* v. *Inland Revenue Commissioners*,[2] but what she did was to appoint two sums of £20,000 and £5,000 which were to be raised out of the settlement. Therefore, she charged those sums of £20,000 and £5,000, amounting together to £25,000, on the whole of the investments which remained subject to the trusts of the £100,000 legacy. It was the sums of £20,000 and £5,000 which were settled respectively by settlement A and settlement B. It was, in fact, an arrangement between the trustees of Mr. Joynson's will and the trustees of settlement A and the trustees of settlement B which enabled the liability to raise the sums of £20,000 and £5,000 respectively to be satisfied by the handing over of the investments and a certain amount of cash. That was not part of the transaction between Lady Brentford and her children and the trustees of the respective settlements; it was merely a method of carrying out the provisions of the deeds, that is to say, an appointment of the two sums and a release of Lady Brentford's interest as life tenant in those two sums. Examination of clause 3 of the deed

---

[2] Ante, 364.

1954

JOYNSON'S WILL TRUSTS, *In re.* GADDUM *v.* INLAND REVENUE COMMISSIONERS.

of appointment of 1947 shows that the matter is clear beyond argument. That clause provides: " The appointor hereby releases " her life interest in the said sums of £20,000 and £5,000." In the circumstances of this case, therefore, the question what was the property in which the interest subsisted and ceased to subsist by virtue of the appointment by Lady Brentford, can only be answered by saying that it was the two sums of £20,000 and £5,000.

Declarations accordingly.

Solicitors: *Joynson-Hicks & Co.; Solicitor of Inland Revenue; Walters & Hart.*

I. G. R. M.

1953
Nov. 9, 10, 11, 12, 13.

Roxburgh J.

In re HOUSE PROPERTY AND INVESTMENT CO. LD.

[00693 of 1952.]

Company—Winding up—Lease of valuable property to company at less than rack-rent—Assignment of lease for value in voluntary liquidation of parent company—Claim by lessor to have sufficient assets set aside to meet future liability under covenants—Right to prove in liquidation—Landlord and tenant—Lease—Assignment—Landlord's rights against original tenant and assignee—Judicial precedent—House of Lords decision—How far binding—Irreconcilable cases of higher tribunals.

A lessor demised valuable property to a company for a term of 90 years. Soon afterwards the company went into voluntary liquidation, and assigned, with the lessor's consent, the lease to its parent company.

Later, the parent company passed a resolution for voluntary winding up, and in the liquidation assigned, for £46,000 with consent, its leasehold interest to a substantial assignee. The assets available for distribution were in excess of £2 million. The rent under the lease was £5,000, the rack-rent over £9,000.

The lessor declined to accept rent from the assignee and took out a summons in which he claimed that there should be sufficient assets set aside in the liquidation to meet all future liabilities for rent and for the performance of the lessee's covenants; alternatively, he claimed the right to prove in the winding up in respect of the company's liabilities under the lease:—

Held, (1) that the lessor had no absolute right to claim that a sum should be so set aside, but that it was a possible course; (2) that to make such an order in a case where a valuable lease was assigned for value would be to create a most dangerous precedent, in that it would constitute a serious clog on the statutory right of a solvent company to go into liquidation and to dispose of its assets within a reasonable time, and such an order would give to the lessor something substantially more than the compensation to which he was entitled; and (3) that accordingly the proper course for the lessor was to lodge a proof in the winding up (for the difference between the value of the lease with and without the benefit of the original lessee's covenants).

James Smith & Sons (Norwood) Ld. v. *Goodman* [1936] Ch. 216 followed. *Lord Elphinstone* v. *Monkland Iron and Coal Co. Ld.* (1886) 11 App.Cas. 332 distinguished.

In re New Oriental Bank Corporation (No. 2) [1895] 1 Ch. 753; *Metropolis Estates Co. Ld.* v. *Wilde* [1940] 2 K.B. 536; 56 T.L.R. 958; [1940] 3 All E.R. 522; and *Craig's Claim* [1895] 1 Ch. 267 considered.

Per curiam: Certain old cases, such as *Oppenheimer* v. *British and Foreign Exchange and Investment Bank* (1877) 6 Ch.D. 744 and *Gooch* v. *London Banking Association* (1886) 32 Ch.D. 41; 1 T.L.R. 642, in which orders had been made for sums to be set aside for meeting liability for rent, were distinguishable in that (a) there had been no assignment for value, and (b) the liquidator had then no statutory power to disclaim an onerous lease.

ADJOURNED SUMMONS.

By a lease dated March 29, 1933, Reginald Moses Phillips demised the Royal Arcade, London, W.1, to the London Freehold and Leasehold Property Co. Ld. for 90 years at a yearly rental of £3,500 for the first year, £4,000 for the second year, £4,500 for the third year and £5,000 for the remainder of the term.

By a special resolution passed on March 2, 1936, it was resolved that the company be wound up voluntarily.

By an assignment dated March 16, 1936, the lease was, with the lessor's consent, transferred by the company to its parent company, the House Property and Investment Co. Ld. (the respondent company) for the residue of the term granted by the lease. That company was the company in the liquidation of which the present application was made. The company possessed assets of very large value, which fell to be distributed in the winding up.

In the liquidation the company sold and assigned its leasehold interest in the Royal Arcade to one David Bluston at the price of £46,000. The lessor declined to accept rent from the assignee and applied to the court by originating summons to determine (inter alia) whether he, as lessor of the Royal Arcade, was entitled to have sufficient assets of the company set aside to meet all future and other rent and to provide for the performance of the covenants on the part of the company under the lease; and whether the proper amount to be so set aside was £200,000, or any and what other sum.

Millard Tucker Q.C., *R. J. T. Gibson* and *R. R. D. Phillips* for the applicant. The applicant lessor contends that he has a right on the voluntary liquidation of the company to have sufficient assets of the company set aside to protect his interest in the future. The position as to liability for payment of future rent where there is an assignee is illustrated by *Baynton* v. *Morgan*,[1] *Butler Estates Co.* v. *Bean* [2] and *House Property and Investment Co.* v. *Bernardout.*[3] [Reference was also made to *In re Haytor Granite Co.*,[4] *In re London Colonial Co.*,[5] and to sections 116 and 317 of the Companies Act, 1948, and Buckley on the Companies Acts, 12th ed., p. 282.] A sum should be set aside to ensure the payment to the lessor of all future instalments of rent during the rest of the term. Nothing can be read into the statutory provisions enabling a company to use the power to be wound up in order to shed its obligations. The rights of a creditor in a solvent company are supreme, whatever happens. Where there is a claim of this kind it can prevent the money from going to the shareholders. An authority which is very near to the present case is *In re Telegraph Construction Co.*[6] It was not, however, concerned with proceedings for the winding up of a company, but for the reduction of capital. [Reference was also made to *In re Gartness Iron Co.*[7]; *Oppenheimer* v. *British and Foreign Exchange and Investment Bank* [8]; *Gooch* v. *London Banking Association* [9]; *Lord Elphinstone* v. *Monkland Iron and Coal Co.*[10]; *James Smith & Sons (Norwood)* v. *Goodman* [11]; *Hardy* v. *Fothergill*,[12] and *Morgan* v. *Hardy*.[13]]

The lessor has two rights, either to prove or to claim, if he

---

[1] (1888) 22 Q.B.D. 74; 5 T.L.R. 99.

[2] [1942] 1 K.B. 1; 57 T.L.R. 666; [1941] 2 All E.R. 793.

[3] [1948] 1 K.B. 314; 63 T.L.R. 646; [1947] 2 All E.R. 753.

[4] (1865) L.R. 1 Ch. 77.

[5] (1868) L.R. 5 Eq. 561.

[6] (1870) L.R. 10 Eq. 384.

[7] (1870) L.R. 10 Eq. 412.

[8] (1877) 6 Ch.D. 744.

[9] (1886) 32 Ch.D. 41; 1 T.L.R. 642.

[10] (1886) 11 App.Cas. 332.

[11] [1936] Ch. 216.

[12] (1888) 13 App.Cas. 351; 4 T.L.R. 603.

[13] (1887) 18 Q.B.D. 646.

1953

House Property and Investment Co. Ld., *In re.*

wishes, to have a sum set aside. The question is always "What "is the proper provision to be made?" and the answer is: "Such "a sum as would, when invested, produce the sum required." [Reference was also made to *Metropolis Estates Co.* v. *Wilde.*[14] The assignment having taken place, it is possible to prove for the whole of the future rent. The only question is how the liability is to be satisfied. The applicant, not being compelled to prove, does not wish to do so, but to enter a claim for the full amount. [See *Oppenheimer* v. *British and Foreign Exchange Investment Bank*,[15] and *Gooch* v. *London Banking Association*,[16] and Buckley on the Companies Acts, 12th ed., p. 624.]

P. Ingress Bell Q.C. and *Raymond Walton* for the liquidator of the company. The relevant statutory provisions previously in force differed from those of the Companies Act, 1948. The courts were faced with the position that the company was saddled with a liability. [Reference was made to *Hardy* v. *Fothergill.*[17]] Section 133 (1) of the Companies Act, 1862, in which the consequences of a voluntary winding were set out, is materially different from the present legislation, because the court could not authorize the company to part with its assets and there was no machinery for a voluntary winding up. [Reference was made to *In re Telegraph Construction Co.*[18] and *Oppenheimer* v. *British and Foreign Exchange and Investment Bank.*[19]] It will be observed in the latter case that there were still no winding up rules, nor was there any right of disclaimer. [*Gooch* v. *London Banking Association*,[20] Buckley on the Companies Acts, 12th ed., p. 1014, and section 365 of the Companies Act, 1948, were also referred to.]

Reginald Goff Q.C. and *L. J. Morris Smith* for the assignee.

Millard Tucker Q.C., in reply, referred to *In re Armstrong Whitworth Securities Co. Ld.*[21]

Roxburgh J. The applicant in this case is Reginald Moses Phillips, retired estate agent, who states: "I am and was prior "to the granting of the lease hereinafter referred to the freeholder "of the property known as the Royal Arcade, No. 28, Old Bond "Street, and 12, Albemarle Street, London, W.1. This is a

---

[14] [1940] 2 K.B. 536; 56 T.L.R. 958; [1940] 3 All E.R. 522.

[15] 6 Ch.D. 744.

[16] 32 Ch.D. 41.

[17] 13 App.Cas. 351.

[18] L.R. 10 Eq. 384.

[19] 6 Ch.D. 744.

[20] 32 Ch.D. 41.

[21] [1947] Ch. 673; [1947] 2 All E.R. 479.

"property which comprises 15 shops with offices over, and basement storage space and toilet accommodation for each shop, "and it also includes first floor showrooms at each end of the "Arcade."

He says, and it is not in dispute, that his title to the Royal Arcade has at all material times been an absolute title under the Land Registration Act, 1925.

By a lease—in this judgment called "the lease"—dated March 29, 1933, and made between himself of the first part, certain mortgagees of the second part and the London Freehold and Leasehold Property Company Ld., hereinafter called the Property Company, of the third part, in consideration of a premium of £15,000, the applicant with the consent of the said mortgagees demised to the Property Company the said property for the term of 90 years—and the length of the term is not unimportant—from March 25, 1933, subject to and with the benefit of the existing leases therein specified, at a yearly rental of £3,500 for the first year, £4,000 for the second year, £4,500 for the third year and £5,000 for the remainder of the said term.

The lease contained covenants for (inter alia) payment of the rent and rates and to repair and insure, and it contained a proviso for re-entry.

Since the granting of the lease the mortgage of the Royal Arcade in favour of the mortgagees was paid off and the property discharged therefrom. By a special resolution of the Property Company passed on March 2, 1936, it was resolved that the Property Company be wound up voluntarily and that the former respondent, Henry Morris Parry, who is now dead, be appointed liquidator for the purposes of the winding up.

At the date of the passing of the resolution the Property Company was (and at the date of the supplemental deed to which I am about to refer, still was) a subsidiary of the House Property and Investment Company Ld., the company now in liquidation in which the application is made.

By an instrument of transfer of lease, dated March 16, 1936, the property comprised in the lease was transferred by the Property Company and its liquidator to its parent, the respondent company, for the residue of the term granted by the lease.

On July 1, 1937, the applicant, as landlord, made certain claims in the winding up of the Property Company in respect of the Property Company's liability as lessees under the lease, one of which was to have a sum set aside which, when invested in consols, would, with half-yearly rests, be sufficient to produce

1953

House Property and Investment Co. Ld., *In re.*

Roxburgh J.

the rent falling due during the residue of the term of the lease. The applicant made that claim because the Property Company's own covenant to pay such rent throughout the term of the lease would, of course, cease to have effect upon its dissolution.

By a deed (which I will call the supplemental deed) dated February 17, 1938, and made between the applicant of the first part, the Property Company and its liquidator of the second part, and the respondent company of the third part, in consideration of the sum of £105 paid by the respondent company to the applicant to cover his costs in the matter, and of the covenants by the respondent company thereinafter contained, the applicant withdrew the said claim made by him in the winding up of the Property Company and released the Property Company and its liquidator from the covenants and agreements on the part of the Property Company contained in the lease and all liability thereunder, but clause 1 provided that the said release was not to affect the said covenants and agreements binding on the premises demised by the lease and the persons from time to time possessed thereof, but only so far as regarded the personal liability of the Property Company and its liquidator thereunder. Clause 1 also provided that the said release was not to prejudice or affect the applicant's right to re-enter upon the demised premises for non-payment of the rent reserved by or the breach of any of the covenants, agreements or conditions contained in the lease, except so far as the said covenants and agreements were thereinafter modified. By clause 2 the respondent company covenanted with the applicant that as from December 25, 1937, and during the residue of the term granted by the lease—and this is the material covenant—the respondent company would pay the rent reserved by and perform and observe all the covenants and agreements contained in the lease and on the part of the lessees to be performed and observed, but as regards the said covenants and agreements, as the same were modified by clause 4 thereof. By clause 4 of the supplemental deed certain modifications were made in the original terms of the lease which are not material for the purpose of this application. By clause 5 it was provided that the lease should be read in conjunction with the deed and (as so modified) should, as from December 25, 1937, and throughout the residue of the term thereby granted, operate and have effect as between and be binding on the applicant and the respondent company, as though the same had originally been entered into between them instead of between the applicant and the Property Company. The deed was duly noted on the register at the Land Registry.

On July 19, 1951, the respondent company resolved by special resolution that it should be wound up voluntarily and, by ordinary resolution, that the respondent, Norman Percival Seaton, and the now deceased former respondent, Henry Morris Parry, be appointed liquidators for the purposes of the winding up.

I said at a very early stage that in my opinion in this case both parties have acted reasonably. The difficult questions which I have to determine at present are solely questions of law. The short point is that, if the respondent company, which is very heavily solvent—I mean, assets of very large value fall to be distributed in the winding up—is allowed to dissolve, the applicant will lose something of value. That is indisputable. The respondent company filed a declaration of solvency in June, 1951. That declaration showed that the surplus assets, after satisfying all liabilities, were estimated at £2,207,857. In its liquidation the respondent company sold and assigned its leasehold interest in the Royal Arcade to the respondent, David Bluston. That, I may interpose to say, I regard as a feature of cardinal importance. This is not a case of a lease which was onerous to the lessee; this was not a lease which any liquidator would want to disclaim, such as are some of the leases in some of the cases to which I have been referred. Nor is this a case where the liquidator remains in beneficial occupation, as happened in some of those cases. Nor is it a case where the original lessee remains in possession and is the only person liable on the covenants in the lease. It is none of those cases. On the contrary, it is a case where the company has assigned the lease, as will appear in a moment, for a very substantial consideration. Though nobody doubts, of course, that the applicant has the benefit of the covenants of the company in liquidation, equally there is no doubt that he cannot get the rent twice over.

What has happened about these premises since the assignment is stated in the affidavit of the respondent liquidator? It appears that the respondent Bluston tendered the rent, and that the applicant refused to accept it. The total rentals of the premises at the present time amount to £8,481 10s. per annum. The price which the respondent Bluston paid the liquidator for the assignment of the lease was £46,000. Obviously, therefore, it was not at all in the nature of a white elephant.

Now, after correspondence, and no doubt in order to bring the matter to a head, the liquidator sent the applicant a notice to submit a proof, and the applicant thereupon took out this originating summons.

These are the questions—no application was ever made to amend them, though the possibility of such an application seemed imminent at one stage.—1. Whether the applicant as the lessor of the Royal Arcade under the lease to which I have referred is entitled to have sufficient assets of the company set aside to meet all future and other rent under the lease and supplemental deed and to provide for the performance of the covenants on the part of the company under the lease and supplemental deed. 2. Whether the proper amount to be so set aside is £200,000 or any and what other sum. 3. Whether the said sum should be paid into court or how otherwise the sum should be set aside. 4. All other necessary directions. 5. In the event of the answer to question 1 being in the negative, that the time for proving in the winding up of the company in respect of its liabilities under the said lease and supplemental deed may be extended for one month from the date of the order to be made hereon or such further or other time as the court shall think fit. 6. In the same event that the respondent liquidators may be directed not to proceed with any distribution in the winding up of the company pursuant to rule 106 of the Companies (Winding Up) Rules, 1949, pending adjudication on and disposal of the applicant's proof, without retaining in hand the sum aforesaid or other sum approved by the court earmarked only for the satisfaction of the applicant's proof. 7. In the same event whether on the receipt by the registrar of companies of the account and either of the returns referred to in section 290 (4) of the Companies Act, 1948, or alternatively on the dissolution of the company the applicant will be entitled to re-enter on the said property either under the power of re-entry contained in the said lease or otherwise (subject nevertheless to any relief against such forfeiture which may be granted to any person by any competent court). 8. All necessary interlocutory and other relief. 9. That the costs of and incidental to this application may be provided for out of the assets of the company.

The first question, which has been most fully and ably argued by Mr. Tucker, is: has the applicant a right in law or equity to have a fund set aside? Of course, if he has, that is an end of the case except as to the amount of the fund. If he has not, then the next question is whether I have jurisdiction to set aside such a fund. Of course, if I have not, that would be an end of that point. The third question is: supposing that the applicant has no absolute right in law or equity to have the fund set aside, but that the court has jurisdiction to set it aside, ought the court to set it aside? If the answer to the question is that it ought to set it aside, then the court would have to proceed to the assessment of what is the actual sum to be set aside, and how it is to be set aside.

I want to dispose of some minor matters before I come to the main question. If a fund is to be set aside, I have indicated all the points that arise. If a fund is not to be set aside, the summons asks that the time for proving be extended, and that sufficient sums should be kept in hand until the proof has been finally adjudicated upon.

As regards those two claims for relief, the liquidator has at no stage raised any opposition, and therefore, if my decision should be that a fund ought not to be set aside, it follows as a matter of course that questions 5 and 6 will be answered in the way in which the applicant seeks to have them answered.

Question 7, however, stands on quite a different footing. The assignee is before the court. I think that that was a very sensible step to take. I do not make any complaint about it at all, but there is one difficulty which will make it quite impossible for me to proceed at this stage, if my answer to the first three questions is in the negative. The applicant is not bound to prove. I do not know whether he will prove or not, but one thing is quite certain, and that is that his course of action in that regard might—I do not say would—have some bearing on the solution of the seventh question. I take the view that Mr. Goff, who represents the assignee and who has the estate, that is to say, the leasehold, is entitled to know what the applicant proposes to do about that, before he is called on to defend his position against a claim to re-enter which might—I do not say it would, but it might—compel him to ask for relief. Therefore it is clear that I cannot proceed today with those questions which arise if my answer to question 1 is in the negative. That is the question which I have to consider, and it is a difficult question and one that has been debated for many years.

There is one recent decision of the Court of Appeal, and one only, which has any bearing on my problem—*James Smith & Sons (Norwood) Ld.* v. *Goodman.*[1] That case was very like this in some respects, but it took a course which could not be described as usual; and it has been argued, and with great force, that, by reason of the course it took, I ought not to treat it as having the authority which I should have been bound to give it, if it had taken another course. It is also said—and I will return to that question later—that it is unsatisfactory for another reason, namely, that it is said to be at variance with a decision in the House of Lords; and it is possible, though by no means certain, that that decision of the House of Lords was not cited to the Court of Appeal. The headnote reads: "In September, "1925, certain premises were demised under two leases to a "company, and each of the leases contained a personal covenant "on the part of the company, as tenants, to pay the rent during "the currency of the lease. In January, 1933, notice was given "by the company to determine the leases, with the result that "they would come to an end at Michaelmas, 1938. In January, "1933, the premises were assigned to another tenant." So far as I can see, the only distinction between those facts and those of the present case is that the assignment in this case took place after the commencement of the liquidation, and in that case before the liquidation. I cannot myself see that that can be—although, undoubtedly, it is an interesting fact—a material distinction in law.

---

[1] [1936] Ch. 216.

After that, the facts depart from the present case. In April, 1933, the company went into voluntary liquidation, and the liquidator distributed the assets without making provision for future rent due under the leases. The headnote continues: "In an action brought by the lessors against the liquidator for a "declaration that, in distributing the assets without making "provision for the liabilities of the company under the two "leases, he had acted wrongfully and negligently and in breach "of his duty as liquidator, and for damages: *Held*, (affirming "the decision of Bennett J.) that the liability was one which "ought to have been admitted to proof by the liquidator under "section 261 of the Companies Act, 1929, and that he had com-"mitted a breach of his statutory duty under section 247 of the "Act to pay or provide for the liabilities of the company, in not "taking steps to have the value of the contingent liability "ascertained, and that he was liable in damages to the "plaintiffs."

Before I continue to read that case, I should say that that reference to contingent liability leads me to make one observation about a point which Mr. Tucker has stressed, and, if I may say so, rightly stressed. It may be doubted whether the words "contingent liability" which occur in some of the cases are quite an accurate description of the position; in fact, they are not, though it is a convenient phrase. The position, as I understand it, is this: that the landlord can recover the rent after an assignment either from the lessee or the assignee; from the lessee because of privity of contract, and from the assignee by reason of privity of estate. When I say "assignee," I mean "permitted "assignee," and that is not unimportant, as will appear, I think, when I come to deal with a certain Scottish decision. What the position would be if the lease were assigned without consent, I need not explore, because it did not happen in this case, but it is undoubtedly true that the position might be different; because, supposing that the landlord was objecting to the assignment, then he could not safely accept rent from the assignee without giving up his right to object to the assignment—at least, I should not think that he could. I have not fully considered that, but, at any rate, I suspect that that is so. Therefore it does not seem to me to follow that what I am saying about permitted assignments is necessarily true about non-permitted assignments, and I am talking about permitted assignments.

There is no doubt in my mind that the landlord is bound to accept the rent from a permitted assignee if he tenders it. He cannot refuse to accept the rent and say that he likes the original lessee's money better. In other words, that tender of the rent discharges the original lessee from that amount of rent. If, of course, the assignee does not tender the rent, the landlord can elect whether he will proceed against the original lessee or the assignee or both; but even so, he cannot get the rent more than once.

I agree with Mr. Tucker that to call that a contingent liability is perhaps not very accurate, but I must confess that I do not know of any short formula which really adequately describes that liability, but a liability it certainly is.

In the case to which I am referring, Mr. Christie, on behalf of the liquidator, contended that the original lessee had no right to insist on anything being done in regard to his claim before a distribution. That was, of course, his point. He had to say that he had no right to anything in order to succeed. The court heard him fully. It is not clear how far they heard the respondents. There is one line in the interlocutory observation by Lord Hanworth which would suggest that they did not hear the respondents at all. I cannot say how far the court had heard the respondents when Lord Hanworth made his interposition, which is in no sense a binding judgment on any court, that has been very much pressed on me by Mr. Tucker, but I must read it, because it is necessary to do so in order to explain what happened and how the case proceeded[2]: "We are prepared to hold in your "favour that the judgment of Bennett J. ought to be affirmed, "that the liability"—and as I say, so far as I can see the liability does not differ one iota in that case from that in the present case—"was one which was provable in the course of the "liquidation, and which ought to have been admitted to proof "by the liquidator, and the liquidator ought to have taken steps "to have the value of the contingent liability ascertained, and "that therefore there is ground for affirming the judgment of "Bennett J., who has affirmed the liability against the liquidator "and ordered an inquiry as to what is the quantum of that "liability. If you want to go further and to say that it is plain, "quite apart from what may be revealed in the inquiry, that "the amount of the rent ought to have been set aside, we should "have to hear you, because we are not prepared to say that the "decision in *Gooch's* case[3]"—that is a case to which I shall refer later—"would apply in all cases and that the liquidator was "wrong in not setting aside sufficient assets to provide for the "further rent and other liabilities. That would be a possible "course; but it is not one which can be affirmed as the necessary "right on the part of the landlord. It is a possible protection "which could have been granted him, but it should not be taken "as an absolute right."

In answer to that interposition, junior counsel for the respondents said: "I do not think we need carry the matter any "further, because Maugham L.J. put the point that the court "in assessing the damages cannot shut its eyes to what has "happened in the present case." That is a point on which these two cases are very markedly distinct, for in this case the assignee tendered the rent, and it was not accepted, but in that case the assignee did not tender the rent, and as far as I can make out, was not likely to do so. That is the point of that observation by junior counsel.

As I say, I do not regard that as in any way binding on anybody, but Lord Hanworth dealt with the matter in his judgment and in my view it is not possible to say that it was obiter, and I will give my reason. It was essential for the Court of Appeal to decide that the liquidator had a duty to do something, otherwise the appeal had to be allowed. Therefore they did decide that he ought at least to have admitted this claim to proof. If that is so, then setting aside a fund cannot possibly be the only remedy in all circumstances because that would ex hypothesi exclude the admission of proof.

---

[2] [1936] Ch. 216, 227.

[3] (1886) 32 Ch.D. 41; 1 T.L.R. 642.

Therefore, as I say, I cannot treat it as obiter, though it is true to say that the question of the right to have a fund set aside was not further argued in the circumstances which I have indicated; and therefore that case is not nearly so conclusive of the matter as it would have been if the decision had been made after the hearing of full argument on the other point as well.

Lord Hanworth first said [4]: " In my opinion this claim by the " landlords against their tenants was clearly a liability in respect " of which they could have brought in a proof." That he said quite clearly. He said that it was a contingent liability. I have already made an observation about that phrase, but he went on: " It was a contingent liability, for the assignees might have " satisfied the liability for the rent, but it was a right which they " had against the company who were their tenants under the " demises and who were liable to them under the contract to " pay the rent." That is exactly the present case. " That being " so "—said Lord Hanworth—" if the liquidator had done his " duty he would have seen that a claim was brought in. Now " what was the claim? It is suggested that it was one which it " was impossible to ascertain, and that under those circumstances " it was so contingent that it would not be possible to put a " money value upon it. To my mind the dicta in *Hardy* v. " *Fothergill* [5] are directly contrary to any such suggestion. I " need not refer to the various passages which were mentioned " in the course of the argument, but Lord Selborne, I think, " makes it quite plain that there are cases where such contingent " debts are capable of valuation. He says: ' There may be " ' contracts, such, for example, as a promise to marry (not " ' broken), or a covenant not to molest, or not to carry on a " ' particular trade within certain limits, etc.; which on a fair " ' interpretation of these words ought to be excluded as having a " ' different object from the payment of money in any contin- " ' gency; although if they were broken a jury might award " ' damages for their breach. I must guard myself against being " ' supposed to lay down any rule applicable to cases of that kind, " ' or to any others in which an injunction or specific performance " ' would be the most proper remedy. But the present is not a " ' case of that kind. A contract to indemnify against the non- " ' performance of covenants in a lease, such as covenants to pay

---

[4] [1936] Ch. 216, 228.

[5] (1886) 13 App.Cas. 351; 4 T.L.R. 603.

" 'rent, or to keep the demised premises in repair, or to deliver " 'them up in a proper state at the end of the term is, to all " 'intents and purposes, " an obligation or possibility of an obli- " ' " gation to pay money or money's worth " on the breach of " 'any such covenant: it is " an engagement to pay, or capable " ' " of resulting in payment of, money or money's worth," if " 'the contingency against which the indemnity is provided " 'should occur. Unless excluded . . . on the ground that the " 'statute contemplates those liabilities only which are capable of " 'being fairly valued, and that this particular liability is not " 'capable of being fairly valued, it is, and must be included in " 'those words.' "

Then Lord Hanworth continued, and I regard this of great importance: " It is true, as Mr. Christie said, the court were " there considering words contained in a passage in a statute which " does not find its place in the statute that we are considering " at the present moment, but it is abundantly plain that Lord " Selborne in the words which I have rather cursorily referred " to intended to indicate that a contingent liability to pay rent " was a contingent liability which was capable of being fairly " valued. Lord Macnaghten deals with the matter in more " precise terms. He says: 'It was said that the trustee would " 'have done a foolish thing if he had tried to estimate it, and " 'that if he had put a value upon it, the court on appeal must " 'have set the estimate aside. I cannot agree in this view. A " 'covenant such as that which has given rise to the liability as " 'between the lessor and the lessee is not uncommon. It is not " 'an uncommon thing for leases to be assigned, and for the " 'assignee to undertake the assignor's liability. I cannot think " 'that a person of practical experience in dealing with leasehold " 'property would have any great difficulty in making a fair " 'estimate of the value of such a liability when he was once " 'made acquainted with the circumstances of the particular " 'case.' "

Then Lord Hanworth continued: " It appears therefore that " there was here a liability under the demise which could have " been estimated and was a proper subject for estimation, and " since *Hardy* v. *Fothergill*[6] one must look at such contingent " liabilities as provable in a liquidation or in a bankruptcy."

Lord Hanworth then cited a passage from the judgment of Romer J., in *In re Panther Lead Co.*,[7] as follows: " ' Since the

---

[6] 13 App.Cas. 351.

[7] [1896] 1 Ch. 978, 985; 12 T.L.R. 327.

" ' decision in *Hardy* v. *Fothergill* [9] the old cases as to proof by " ' a lessor to a company in liquidation have to be reconsidered, " ' as was pointed out by Lindley L.J. in *Craig's Claim* [8]; and " ' certainly it will be the duty of the court to assist a lessor in " ' proving in respect of the obligations of a company as lessee " ' under its lease in all cases like the present where the lessor " ' is desirous of proving at once for his loss on the footing of the " ' lease being determined or treated as determined '—he makes " observations that coincide with what I have said as to *Hardy* " v. *Fothergill* [9]—' it will be the duty of the court to assist a " ' lessor in proving in respect of the obligations of a company as " ' lessee under its lease in all cases like the present where the " ' lessor is desirous of proving at once for his loss.' Of course, " in some of the cases, as in *Gooch* v. *London Banking Association*,[10] the liability which was said to rest upon the liquidator " was that he ought to have set aside sufficient assets to provide " for future rent and other liabilities under the lease. That may " be so in proper cases, but it does not appear that that course " is one which would be followed in all cases, and the liquidator " would have the opportunity of going to the court if he was in " difficulty as to what ought to be done." Romer L.J. agreed. Maugham L.J. said [11]: " There is, in my opinion, no doubt " whatever that he "—that is, the liquidator in that case—" was " guilty of negligence in not making some provision for the " liability of the company under the two leases in question. We " have heard a long argument as to what the nature of the " provision should have been. For my part I am satisfied that " since the decision in *Hardy* v. *Fothergill* [12] it has been impossible to doubt but that a company in liquidation, and a fortiori " a perfectly solvent company in liquidation, is bound to submit " to the assessment under the Companies Act of its contingent " liability to a landlord in such a case as the present, that is to " say, in a case in which the company being the original lessee " is no longer interested in the leases. The leases having been " assigned to third parties, the question is whether the landlords " are entitled, under section 261 of the Act of 1929, to prove for " the debt as one payable on a contingency or to prove as for a " claim against the company, ' present or future, certain or " ' contingent, ascertained or sounding only in damages,' arising " by reason of the fact that the company has covenanted to pay

---

[8] [1895] 1 Ch. 267, 275.

[9] 13 App. Cas. 351.

[10] 32 Ch.D. 41.

[11] [1936] Ch. 216, 234.

[12] 13 App.Cas. 351.

" the rent to the landlords during the continuance of the leases. " I have said that in such a case as the present in my opinion " there is no longer any doubt about the right of proof; but I am " not forgetting that where the company is itself the tenant at " the time of the liquidation, considerable difficulty may arise as " to what the precise right may be. Two cases in particular may " arise. The liquidator may desire to surrender and the lessor " may be unwilling to let him do so, or the liquidator may " be unwilling to surrender though the lessor may be willing " to accept the surrender on terms as to proof or otherwise. " Those circumstances do not exist here, and as a matter of fact " since the Act of 1929 will less often arise—for under section 267 " of the Act of 1929, there is, what there was not previously to " the Act, a right of disclaimer when a company is in liquidation.

" In my opinion, in the case which we have here, where the " company is no longer interested in the leases, there is no very " serious difficulty in estimating the amount for which the lessors " are entitled to prove; and all the Lords who sat in the " important case of *Hardy* v. *Fothergill*[13] expressed, I think, " opinions which would at any rate cover this comparatively " simple case. I will mention that Lord Selborne referred to a " dictum of Mellish L.J. in *Ex parte Waters*.[14] " I do not think that I need read further from that passage, because it was only dealing with the right to prove, about which Maugham L.J. said: " In my opinion, there is no longer any doubt about the right of " proof." But towards the end he said this: " Accordingly in " my opinion we have not here to consider whether the course " taken in *Gooch's* case[15] and, I may add, in other cases, of " declining to allow the final winding up of the company and the " distribution of all its assets, without making provision for the " landlord's claim under his lease was the right one. I am " content to agree with the view expressed by my brethren that " here was a claim which could properly be proved under section " 261 of the present Act." That is to say, the Act of 1929.

This is a decision binding on me that a landlord can prove in the liquidation of the original lessee company in respect of the original lessee's original covenants in a lease which has been assigned. He proves for the value of the original lessee's covenants in the particular circumstances of the particular case, the benefit of which he will lose by the original lessee's dissolution; not, of course, for the rent, because, if the assignee duly pays the rent, which he will do if the lease is beneficial, if only to avoid forfeiture, no rent could ever be recovered from the original lessee; and, of course, precisely the same applies to the other covenants. If the premises are duly kept in repair, as they undoubtedly will be by the assignee if the lease is beneficial, if only to avoid forfeiture, then no sum in cash would ever become payable by the original lessee.

---

[13] 13 App.Cas. 351.

[14] (1873) L.R. 8 Ch. 562.

[15] 32 Ch.D. 41.

I certainly do not accept the position that a landlord can refuse rent from, or the performance of the other covenants by, the assignee and at the same time assert a claim against the original lessee. I am not saying this in order to preclude argument as to what may flow from interim refusal to accept some rent in the present case, but I am dealing with it as a matter of principle to see what the obligation of the original lessee was; and it seems to me clear that so far as the particular sum is concerned which has been tendered, the landlord cannot now sue the company in liquidation, and the same would apply in my judgment to each and every payment of rent or each and every other covenant if the assignee had tendered the rent or had endeavoured and wanted to perform the covenants, but had been prevented from so doing by the landlord. In other words, it is not true, in my judgment, that the landlord has a right to elect whether he will accept the rent from one or the other. If it is tendered by the assignee and if he does not accept it, in my judgment he loses all rights in respect of that particular portion of rent. I rather thought, though I may not perhaps have fully comprehended it, that Mr. Tucker was suggesting that the landlord had a complete option in all circumstances in the matter. That view I certainly cannot indorse.

The sum for which a proof could be lodged is the difference between the market value of this particular lease at the date of valuation (and this has been agreed between the parties), with the benefit of the original lessee's covenants, and of the same lease without the benefit of the original lessee's covenants. But the applicant wants to know whether he is relegated to proof. He says, through his counsel, that he has an absolute right to the setting aside of a fund. If it is an absolute right, it prevails in all circumstances; that is, even when an original lessee has assigned a lease for value and thereafter wants to be dissolved; and he will, I am sure, not take it amiss if I say, while entirely acquitting him of any intention to abuse anything or anybody in this case, that that would set a precedent if he succeeded, which, in my judgment, would open the way to quite intolerable abuses.

Mr. Bell, on the other hand, goes altogether the other way, and I am not prepared to decide in his favour on the grounds which he mainly advanced. I will deal at once with his ingenious point. He first reads section 302 of the present Act, which runs as follows: "Subject to the provisions of this Act as to preferential payments, the property of a company shall, on its winding "up"—and he points out that there is a slight change in phraseology there as compared with certain earlier statutes, but I doubt whether the change is entitled to the weight which Mr. Bell sought to place on it—"be applied in satisfaction of its liabilities "pari passu, and, subject to such application, shall, unless the "articles otherwise provide, be distributed among the members "according to their rights and interests in the company." It is noticed that the phrase there is: "distributed."

He then refers me to section 365, which provides that the Lord Chancellor may—in short—make general rules. Then subsection (2)—and this is the important part of the section—is: "All rules made under this section shall be judicially noticed and "shall have effect as if enacted by this Act." Therefore the rules appear to be given statutory force, and it has not been submitted to me, and I should say probably could not be submitted to me, that any rule of the character which I am about to read is ultra vires.

Rule 106 is as follows: "Subject to the provisions of the Act, "and unless otherwise ordered by the court, the liquidator in "any winding up may from time to time fix a certain day . . . "on or before which the creditors of the company are to prove "their debts or claims, and to establish any title they may have "to priority under section 319 of the Act, or to be excluded from "the benefit of any distribution made before such debts are "proved, or as the case may be from objecting to such distribu"tion." It is, "or to be," not "or be," and I think that that may be the crisis.

Mr. Tucker has submitted that the words of that rule do not apply to a claim of the nature which he is putting forward. "Prove," he says, does not there mean prove in the ordinary sense. I am disinclined to accept that submission, as will appear from a later part of this judgment.

He also submits that the word "distribution" means distribution among creditors and does not include a distribution among shareholders. I am disinclined to accept that view; but

1953

HOUSE PROPERTY AND INVESTMENT CO. LD., *In re.*

Roxburgh J.

what he further submits, and what I think is conclusive on this point, is that the rule opens with the words: "Subject to the "provisions of the Act, and unless otherwise ordered by the court." I take the view, rightly or wrongly, but it is a considered view, that those opening words apply to the whole of the first subsection of the rule. It is not: "or be excluded." It is: "or to be excluded." That is to say, it is something that is to be in the notice in which the creditors are called on to prove. He has to give notice of a date on which the creditors are to prove or to be excluded, and I feel no doubt that the whole of that machinery is all subject to the opening words: "Subject to "the provisions of the Act, and unless otherwise ordered by the "court." I have no doubt that in such a case as this the court would invariably make such an order preventing the applicant from being excluded until an interesting point of law which he had raised had been determined by the highest tribunal to which anybody desired to resort, and therefore my conclusion is that so far we are "as we were," that is to say, that this rule neither helps nor hinders the applicant.

I am well aware of the danger of attaching undue importance to the interlocutory observations of a judge, but they are sometimes helpful, not only in the course of the argument, but for future generations, even though sometimes—and I shall come back to that point—they may not be wholly accurate. One thing about them, of course, is clear, and that is that interlocutory observations are not binding on any future court.

But Lord Hanworth said in his interlocutory observations—which I have already read—that setting aside a fund would be a possible course, and I am certainly not prepared to say that that observation, though interlocutory, is wrong. I think, however, that an occasion for its exercise will seldom, if ever, arise in future.

There have been, of course, other changes of relevance in the history of this interesting matter besides the decision in *Hardy* v. *Fothergill.*[16] Lord Maugham pointed to the new right of disclaimer—new, that is to say, in 1929—long after most of the cases upon which Mr. Tucker relied. Then, of course, there is the interesting decision of the Court of Appeal in *Metropolis Estates Co. Ld.* v. *Wilde*,[17] to which I shall come presently, and though I shall venture to suggest that he has misconstrued it, it is, I think, an important point in the history of this subject.

---

[16] 13 App.Cas. 351.

[17] [1940] 2 K.B. 536; 56 T.L.R. 958; [1940] 3 All E.R. 522.

The position, as I understand it now—and I realize that part of what I am saying will be only obiter dictum—is really simple. If the liquidator requires beneficial occupation in the sense in which that term is defined in a case which I shall presently read, that is to say, either for his own occupation, or so so that he can obtain a rent from the premises from a subtenant or other person, then he has to pay the rent. There is no question then of any proof or of the setting aside of any fund; ex hypothesi he cannot close the liquidation while that state of affairs continues. He must somehow get rid of his beneficial occupation before he can close the liquidation. Under the present law what he would do is so obvious that I cannot see how any other position is likely to arise. If the lease is onerous he will endeavour, probably with success, to disclaim it. If the lease is beneficial, that is to say, if there is a value in it, he will, certainly with success, sell it. If my judgment stands in this case, there does not seem likely ever to be in this connexion a future occasion for setting aside, but I do not wish to hold that there may not be such a case. I cannot think of one, but one cannot think of everything.

The conclusion to which I am about to come is, therefore, that there is no absolute right, but that it is a possible course, and if it is a possible course, I shall have to consider whether it is a proper course in this case.

First I desire to consider *In re New Oriental Bank Corporation (No. 2)*[18] and *Metropolis Estates Co. Ld.* v. *Wilde.*[19] They are, in my judgment, most important, though, perhaps wrongly, I feel that Mr. Tucker in his argument misconstrued them.

In the first case the original lessees took possession of certain premises and paid the rent down to May, 1892; but on June 23, 1892, they passed an extraordinary resolution in favour of voluntary winding up, and on July 5, 1892, an order was made continuing the voluntary winding up under supervision. The corporation was insolvent. The liquidator remained in possession of the premises and paid the rent down to October, 1893, when he gave up possession and handed the keys of the premises to the lessors' agents; but inasmuch as no agreement could be arrived at as to the terms on which the corporation should be free from further liability under the lease, possession was only accepted without prejudice to the rights of the lessors in respect of the future liabilities of the corporation under the lease.

---

[18] [1895] 1 Ch. 753; 11 T.L.R. 291.

[19] [1940] 2 K.B. 536.

It is to be noted that in that case there was no assignment. Indeed, I think that it is true to say, with one possible exception, that in all the cases, except *James Smith & Sons (Norwood) Ld.* v. *Goodman*,[20] there was no assignment in the sense which is material in this case. It is a case, of course, in which, presumably, a disclaimer would have been made under the present law, but that was not possible in 1895.

The crisis of the judgment in *In re New Oriental Bank Corporation* (*No.* 2),[21] in my opinion, is in these words: "In my "judgment, if a company which is in liquidation remains in "beneficial occupation of a lease—that is to say, if it occupies "the demised premises, or takes the rent, and thus obtains the "benefit of the lease"—that, if I may say so, is the signification in which I use the phrase "beneficial occupation" in this judgment—"the court ought to do its very best to make the company "pay the rent in full, and not merely a dividend." To that principle no exception can, in my judgment, possibly be taken, and that, in my judgment, is the principle which was applied in the *Metropolis Estates* case,[22] to which I am going to refer next.

Unfortunately, an inaccurate expression was used by the judge in an interlocutory observation, as his judgment, in which he said exactly what he did mean, shows. In the course of argument he said: "If a lease is subsisting when the lessee is adjudi-"cated a bankrupt, how can the lessor prove immediately?" Of course, he did not mean quite that, because, if he had meant that, he could not have gone on to say: "He cannot have both the rent "and possession." He overlooked in the interlocutory observation the fact that a lease would still be subsisting if it had been assigned for value. Of course, nobody can say it is not still subsisting, but it is quite certain from the context that the judge had no intention whatever of making a dictum by way of interlocutory observation about a position which did not arise in that case, namely, the position where there had been an assignment for value. Unfortunately, that is perpetuated in the judgment of the Court of Appeal in the next case, because the member of the court who delivered the judgment of the court took his citation from the interlocutory observation and not from the body of the judgment.

In *Metropolis Estates Co. Ld.* v. *Wilde*[23] the headnote reads: "On December 9, 1935, A. took a lease of a flat for a term of

---

[20] [1936] Ch. 216.
[21] [1895] 1 Ch. 753, 757.
[22] [1940] 2 K.B. 536.
[23] Ibid.

" seven years, from December 25, 1935, at a yearly rent of £200, " payable quarterly in advance. On January 10, 1936, he was " adjudicated bankrupt. On June 30, 1937, he obtained his " discharge from bankruptcy. On October 27, 1939, the lessors " instituted an action in the King's Bench Division against A., " claiming £50 in respect of one quarter's rent due in advance on " September 29, 1939, under the lease. On February 2, 1940, " the official receiver, as A.'s trustee in bankruptcy, without " obtaining the leave of the court, purported to disclaim A.'s " interest under the lease:—*Held*, affirming the decision of the " Common Serjeant, that A.'s liability to the lessors remained " unaffected, because they could not prove in bankruptcy for " future rents, and, that being so, A.'s discharge from bankruptcy " had no effect with regard to future rents under the lease. " *Held*, also, that there had been no valid disclaimer of the lease, " because the trustee in bankruptcy had not complied with the " provisions of section 54 (3) of the Bankruptcy Act, 1914, " relative to getting the leave of the court."

That is very important because again this matter could not have arisen but for the invalidity of the purported disclaimer. If the trustee had validly disclaimed, then, of course, this case could never have been brought; that is obvious. But what happened was that, though it is true that in this case—unlike a company case—the estate of the bankrupt vested in the trustee, the bankrupt remained in beneficial occupation, and as the legal estate was vested in the trustee, the bankrupt must have been in occupation, presumably, under some arrangement between the trustee and the bankrupt; at any rate, neither the trustee nor the bankrupt could be heard to say that there had been an assignment of the premises for value. Therefore, I can find nothing at all surprising in the decision itself, but it seems to me quite clear from the judgment as a whole that the court intended to apply the principle enunciated in the judgment in the *New Oriental Bank* (*No.* 2) case[24] and not the principle enunciated in certain words in the interlocutory observation; though the court did not use the phrase " beneficial occupation " but used the phrase " existing lease."

I will read the passage[25]: " The fallacy in this argument is " that the premise on which it is based, namely, that the lessors " were entitled to prove in Wilde's bankruptcy for all future rent " under the lease is without foundation, for where a lessor is

---

[24] [1895] 1 Ch. 753.

[25] [1940] 2 K.B. 536, 542.

" seeking to prove against a bankrupt lessee's estate in respect of " an existing lease he can only prove for the arrears of rent due and " the breaches of covenant which have taken place up to the time " of proof: see *In re New Oriental Bank Corporation* (*No.* 2).[26] "

In my judgment the court had picked up the phrase " existing " lease " from the interlocutory observation, but they were intending to apply the doctrine enunciated in the judgment in that case which, of course, has no application to a case where there has been an assignment of the lease for value. I keep on putting in the word " value " because I am not considering what would be the position if there was an assignment to a man of straw. Nobody has ventured to suggest that Mr. Bluston is a man of straw, and I keep on putting in the word " value " for that reason. What I have said may or may not, I do not know, apply to an assignment to a man of straw, but that is not the case which I am considering.

I am quite certain in my own mind that the Court of Appeal in the *Metropolis Estates* case[27] never intended to express any opinion whatever about the quite different problem with which I am confronted.

It is undoubtedly true that a practice grew up of setting aside a fund in certain analogous cases, though, strangely enough, no case has been cited to me which bears any real resemblance on its facts to the present case, the nearest being the case in the Court of Appeal in 1936. This practice was explained by Lindley L.J. very clearly and succinctly in the judgment of the court in *Craig's Claim*,[28] and I cannot do better than read it because it really is a summary of the existing position at that time, and it ends with a most important warning. The headnote reads: " The lessee of certain mines assigned his leases to a " company which covenanted to indemnify him against liability " thereunder. The company went into liquidation, and a scheme " of arrangement under the Joint Stock Companies Arrangement " Act, 1870, was adopted and approved by the court for forming a " new company which should take over the assets and liabilities of " the old company, and should pay or satisfy the unsecured " creditors of the old company within three months of the " approval of the scheme by the court. After the new company " was incorporated the lessee applied in the liquidation to have " a sum provided to meet his contingent liability for rents, " royalties, and breaches of covenant."

---

[26] [1895] 1 Ch. 753.

[27] [1940] 2 K.B. 536.

[28] [1895] 1 Ch. 267.

Lindley L.J. said[29]: "First, as regards Mr. Craig's rights "against the old company, apart from the scheme. With "respect to that, section 158 of the Companies Act, 1862"—which corresponds, for the present purposes, with section 316 of the present Act. Having read it, he said: "Notwithstanding "the very comprehensive language of this section, Giffard L.J., "when Vice-Chancellor, decided in *Horsey's Claim*[30] that, as "it was impossible to put a just estimate on the claim of a "landlord to future rent and possible breaches of covenant, he "was not entitled to prove against a limited company being "wound up and to receive a dividend on his proof, and this view "prevailed until a comparatively recent date."

I may say that that view is no longer possible, because the Court of Appeal in 1936 decided quite finally, so far as I am concerned, against that view. *Horsey's Claim*,[30] so far as it is based on this ground, is no longer law in this court.

Then Lindley L.J. went on: "But after the decision of the "House of Lords in the case of *Hardy* v. *Fothergill*[31] which "must be considered in connexion with section 10 of the Judicature Act, 1875"—that is, because of section 317, whose predecessor found its way into company law under section 10 of the Judicature Act, 1875—"it is difficult, if not impossible, to "say that Mr. Craig could not have had his claim valued and "have proved for its value against the old company. Mr. Craig, "however, does not really want to do this. What he wants is "to enter a claim with a view to have assets of the old company "set apart for his indemnity before they are divided amongst the "shareholders; or, if he is not in time for that, he asks that "the old company may not be formally dissolved so long as he "is exposed to liability under his covenants. He bases his claim "in this respect on certain decisions in which a lessor of a "limited company being wound up or applying for leave to "reduce its capital has been held entitled to enter a claim for "the amount of rent and royalties which may become due to "him in future, and to an injunction to restrain the company "from distributing its assets and dissolving without making "proper provision for his payment. The cases in which orders to "this effect have been made are: *In re Telegraph Construction* "*Company*,[32] *Oppenheimer* v. *British and Foreign Exchange and* "*Investment Bank*,[33] *Gooch* v. *London Banking Association*[34]

---

[29] [1895] 1 Ch. 267, 275.

[30] (1868) L.R. 5 Eq. 561.

[31] 13 App.Cas. 351.

[32] (1870) L.R. 10 Eq. 384.

[33] (1877) 6 Ch.D. 744.

[34] 32 Ch.D. 41.

" and *Lord Elphinstone* v. *Monkland Iron and Coal Company.*[35] " The last of these cases "—and that one is indeed Mr. Tucker's sheet anchor, and I propose later to make a minute analysis of it—" was in the House of Lords, and the House made " an order in favour of the lessor of a limited company which " was being wound up voluntarily, and declared that the lessee " company was bound to fulfil its future obligations under its " lease, and that the liquidators were bound to make due provision for fulfilling such obligations and to set aside assets of " the company in their hands for that purpose. It is true that " this was a Scottish case, and a case between lessor and lessee; " but we see no reason to suppose that there is any difference " between English and Scottish law in this respect."

I must confess that that sentence has caused me some embarrassment, because I am going to suggest that there are important differences. I can hardly think that that passage could be regarded as anything more than an obiter dictum at that point.

" The effect, however, of the decision in *Hardy* v. *Fothergill* [36] "—and with this, if I may say so, I am wholeheartedly in sympathy—" on the right of a lessor to have the assets of a " limited company which is being wound up impounded has not " yet been judicially determined. The English decisions in " favour of his right to enter a claim and have assets impounded " to meet it have all proceeded upon the view that the lessor " could not prove for any ascertainable sum and be paid a dividend upon it, and on some future occasion those decisions will " have to be reconsidered."

Pausing there, so far as my researches have gone—and I must say that they have not gone outside the extraordinarily careful and far-reaching argument of Mr. Tucker—that statement, which is of course obiter, is wholly accurate. Of course, it follows that if it was based on a premise which the Court of Appeal as a matter of decision has held to be wrong—and the premise has been as a matter of decision held to be wrong—then a judge of first instance is not impertinent if he looks anew even at things which have been said in the House of Lords; because after all, if the whole basis of one court's decision is declared by another court in a decision binding on me to be false, it is not unreasonable to think that the conclusions derived from the false premise may well be open to legitimate question.

---

[35] (1886) 11 App.Cas. 332.

[36] 13 App.Cas. 351.

I want to make another point at this stage. In what sense are decisions of the House of Lords binding? They are absolutely binding on every court, including, I think, themselves in regard to the matter on which the decision is given, or any matter which is not distinguishable. Normally, however, they have a much wider importance. It often becomes material to consider whether a decision of the House of Lords should be applied in a case which can be distinguished, but is analogous. Normally, in such a case a judge hesitates long before disregarding a proposition stated in a speech in the House of Lords, even though his case is distinguishable if it is analogous. But I think that that normal rule ceases to operate when the basis on which all the earlier law was founded has been destroyed, first indirectly in *Hardy* v. *Fothergill*,[37] and later positively by the decision of the Court of Appeal in 1936, and when there have been such important changes in the whole situation, such as, for instance, the right of disclaimer, which had no application whatever in the days when these broad pronouncements were being enunciated. I think that I have spoken with respect of the highest tribunal in these matters, but I must go into this question, because there is undoubtedly difficulty in the case in the House of Lords to which I am coming, and it is undoubtedly true that if nothing had happened since, I should have felt, though it is easily distinguishable, that I ought to apply it on the footing that it was an analogous case; but unless it is indistinguishable, I do not think that, in view of what has happened since, I ought to apply it in an analogous case.

I have stressed that, because the position is precisely stated in *Craig's Claim* [38] by Lindley L.J.

Another preliminary question is, what is the duty of a judge when he is confronted with a series of decisions which are difficult to reconcile? In my judgment, if there is a decision which cannot be distinguished from the case before him, even if it is a decision of a judge of the first instance, a fortiori, of course, if it is a decision of the Court of Appeal or of the House of Lords, he ought to apply it—expressing maybe his doubts whether it is still good law, but leaving a superior tribunal to overrule it. There might have been in the books some case, either before or after *Hardy* v. *Fothergill*,[39] in which a fund had been set aside in favour of a landlord out of the assets of an original covenantor when the lease had been sold for a large sum of money, in which

[37] 13 App.Cas. 351.

[38] [1895] 1 Ch. 275.

[39] 13 App.Cas. 351.

the jeopardy of the landlord, though not to be treated as of peppercorn value, ought certainly to be capable of being estimated for proof. I must be careful to say nothing to jeopardize the valuation which may come hereafter; but nobody could say that in the present case there is any real jeopardy. If there were any such case in the books, decided either at first instance, or by the Court of Appeal or the House of Lords, I should have considered it my duty to follow it and to give such encouragement as I could to Mr. Bell to go to the Court of Appeal. But that is not the position. No case has been brought to my attention which is really indistinguishable from the present case. There are analogous cases in abundance, and that being so, I think that it is my duty to endeavour to apply the principles which can best be extracted from the reported decisions as a whole, having in mind what has been said over and over again about the bearing of *Hardy* v. *Fothergill* [40] on the problem, and may I add once more, the bearing of the right of disclaimer.

I will refer to two of these earlier cases. I agree that they are only two out of a large number. The first is *Oppenheimer* v. *British and Foreign Exchange and Investment Bank.*[41] That case shows the danger of dealing with this type of case by analogy. In that case a banking company had been registered under the Companies Act of 1862 and had obtained demises of premises from the plaintiff and covenanted to pay him rent at the usual periods during the terms. The shareholders passed a resolution for a voluntary winding up, though the company was not insolvent. The headnote reads: " A question having arisen as to plaintiff's " claim for the future rent, he brought an action for an injunction " to restrain the distribution of the assets until the liability of the " company had been provided for:—*Held*, that the lessor was " entitled to have a sum set apart which, when invested in consols, " would, with half yearly rests, be sufficient to produce the " amount of the rent."

It is quite plain that there was there no assignment of any kind. The Vice-Chancellor said [42]: " The question which has arisen is a " very important one no doubt "—he could hardly have thought that it would not have been finally decided some 75 years afterwards—" but I am more embarrassed "—and perhaps I might echo this—" by the expressions which are to be found in " the judgments of the cases which have been referred to than " by any great difficulty in this case." That is certainly true here. " The 158th section of the Companies Act, 1862, enacts " —and then he read it; again it is the same mutatis mutandis, I think, for this purpose with section 316 of the present Act. Then he said: " It seems to me that rent is a sum which does " bear a certain value, therefore the latter branch of the section " is applicable only where the claim is incapable of bearing " a certain value. Rent is not payable as a debt or a claim " subject to a contingency; and because there is another remedy " for payment, namely, by distress, its value is not made less " certain. It appears to me, therefore, that the plaintiff is " entitled to claim for the full amount and to have a sum pro" vided to meet it, less only such a sum as, when the whole has " been set apart and invested, and is yielding income, will be " necessary to make up the full amount."

---

[40] 13 App.Cas. 351.

[41] 6 Ch.D. 744.

[42] Ibid. 746.

Of course, the Vice-Chancellor was speaking of the position between an original lessor and an original lessee, and, whether or not his observations on that topic, which are the foundation of his judgment, would be accepted today, they are plainly quite inappropriate to a case where there has been an assignment for value. So there is an analogous case in which the ratio decidendi is wholly inappropriate to the present case. I think that that is an illustration of the danger of proceeding by analogy in this case.

Then in *Gooch* v. *London Banking Association*[43] the headnote reads: " An injunction was granted, on motion by the " lessor, to restrain a company in voluntary liquidation from " distributing assets among its shareholders without setting aside " sufficient assets to provide for future rent and other liabilities " under a lease." This case went on appeal, but the appeal was compromised before judgment. The case was very shortly before *Hardy* v. *Fothergill.*[44] I rather think, though Mr. Bell doubted it, that, if it had not been compromised, the Court of Appeal would have probably affirmed the decision of the court below. Here I invoke Mr. Tucker's submission. Though there are some interlocutory observations of considerable strength during the argument in the Court of Appeal, these are not binding, because there was no judgment; and I cannot think it at all likely, having regard to what Lord Hanworth M.R. and Maugham L.J. said in *James Smith & Sons (Norwood) Ld.* v. *Goodman*,[45] that the Court of Appeal would make similar interlocutory interjections in the circumstances of today. So there again the case, though it is analogous, has this important difference, that it is not one in which there had been an assignment for value. That difference, I think, is most important, having regard to the choice which now seems to be envisaged by the general policy of the Act. It seems quite plain that it is intended, and deliberately intended, by Parliament that the liquidator should do one of the three things to which I have already referred.

---

[43] 32 Ch.D. 41.

[44] 13 App.Cas. 351.

[45] [1936] Ch. 216.

These cases to which I have been referred really seem to be mainly concerned with the position of the liquidator when he is either in beneficial occupation, or unable to assign the lease; there being in those days no right of disclaimer and the lease being in its nature onerous.

I come now to what is undoubtedly Mr. Tucker's sheet anchor. Am I bound by *Elphinstone's* case [46]? If it decides the point before me—in other words, if I cannot distinguish it from the present case—I conceive myself to be bound by it. If, on the other hand, I can distinguish it, as I think that I can, ought I to follow some of the observations in the speeches? I must look into this case with some care. "According to the law of "Scotland," said Lord Watson,[47] "the assignation of his lease "by a tenant, who has power to assign, has the effect of making "the assignee sole tenant"—the word "sole" is the important thing—"from the time he attains possession of the subject of "the lease, and of discharging the cedent"—which, of course, means the assignor—"from future liability to the landlord. When "the tenant has no power to assign, the unqualified acceptance "of the assignee by the landlord, whether express or implied, "has the same effect."

I have read that passage at the opening of my analysis of this case because we are here considering that part of the law of Scotland which corresponds to the English branch of law relating to assignments without the consent of the landlord. That is quite clear, and it is also quite clear that the two laws are different, which is important.

That case related to an agricultural lease of November, 1870, of which the respondents were the assignees and the appellant was the landlord, and to a minute containing 13 articles of contract—of course, this is Scottish and not English conveyancing—dated 1877 which related to the deposit of mineral refuse on the appellant's land, and to which the respondents were original parties. The case in the court below also related to four other

[46] 11 App.Cas. 332.

[47] Ibid. 336.

deeds, but the case in the House of Lords related only to the two which I have specifically mentioned. It is stated as follows [48]: " The affairs of the respondent company became " embarrassed; and, at an extraordinary meeting held on the 30th " of May, 1881, it was resolved that the company should be " wound up voluntarily, and the respondents, William Mackinnon " and Nathaniel Spens, were appointed liquidators. On the 9th " of August, 1881, the liquidators sold, by public roup," which, of course, is by auction—" the whole property and assets of the " company, heritable and movable, including the company's " right and interest in the leases and agreements "—that is all six of them; the four which were disposed of in the courts below and the two which were dealt with in the House of Lords—" to " a gentleman, who subsequently declared that he made the purchase on behalf of a new company, then in course of formation, " which was incorporated and registered in September, 1881, as " the Monkland Iron Company, Limited. In December, 1881, " the respondents executed two formal assignations "—which, of course, corresponds to assignments—" transferring and making " over their whole rights and interests, as tenants or otherwise, " and their whole obligations and liabilities, under the six deeds " of lease and agreement already specified, to the new company." So that we are dealing—and this is the great importance of this case—with the case where there has been a purported assignment. I put in the word " purported " for reasons which will appear later.

" On the 1st of July, 1881, the appellant lodged a claim in the " liquidation, in which he insisted upon the liability of the respondent company to fulfil all the obligations and liabilities already " incurred, or to become prestable to him under these six deeds. " The liquidators gave no deliverance upon the claim, but proceeded to pay the creditors of the company; and after settling " all claims of debt (other than the appellant's) a considerable " sum remained in their hands at the time when this action was " raised "—that means begun—" on the 29th of October, 1883. " Between September, 1881, and October, 1883, there was a good " deal of correspondence between the appellant's agents on the " one hand, and the respondents and the new company on the " other, as to the terms upon which the appellant should recognize the new company as having right by assignation to the " leases and agreements in question." I stress that; the point was that the landlord was saying that the assignees were not entitled as against him to be treated as the tenants, and the old company was saying that they were; in other words, a question I should have thought by its very nature peculiar to Scottish law.

---

[48] 11 App.Cas. 334.

"These negotiations terminated with an assertion on the part "of the respondents and the new company that the respondents "had absolute power to assign, and that the appellant had not "the option to give or withhold recognition of the new company "as tenants in lieu and stead of the respondent company; and "the present action was brought in consequence of an intima-"tion made by the liquidators on the 4th of October, 1883, to the "effect that, if no proceedings were taken to interpel them"—which, I think, means to restrain them by injunction—"before "the 31st of that month, they would distribute the surplus assets "among the shareholders of the company. The leading conclu-"sions of the appellant's summons are for declarator that the "respondent company are still liable to fulfil the whole obligations "and liabilities attaching to them under the contracts assigned "to the new company"—in other words, that there had been no assignment which was binding on the landlord—"and that the "liquidators are bound to set aside the whole or so much of the "surplus assets as may be required to meet such obligations and "liabilities as they become due and prestable. These conclusions "are founded upon the allegation that the respondents had no "power to assign so as to make the new company the appellant's "debtors in these obligations and liabilities without his consent."

That was the issue which was joined, and the question was whether the original lessees were liable and the assignees not liable, or whether the assignees were liable and the original lessees were not liable. In other words, it was a question which, so far as I know, could not possibly arise in England unless—and I must put this in—it arose in some case in which there had been an assignment without a licence when a licence was required. I do not wish to pursue that question because the law is not the same in England and Scotland, and what would happen in such a case is quite irrelevant to the present case.

There was no argument on the question whether, if the old company was solely liable, there would have to be a setting aside. I hardly think that there could have been any argument as the law stood in 1886. If the assignment was valid ex hypothesi the old company would cease to be liable altogether; Lord Watson has made that quite plain, and therefore it is simply one more in the line of cases where there has been no assignment for value, differing only from those to which I have referred in that it was decided in the House of Lords. I regard that case as no authority whatever on what the position would have been if the decision had been that both the old company and the new company were liable.

The case proceeded on the two deeds which I have specifically mentioned.[49] " The Lord Ordinary (Lee), on the 22nd of March, " 1884, gave the appellant decree in terms of the declaratory " conclusions."—which I understand to mean granted an injunction in the terms asked for in the proceedings—" The case was " then carried by reclaiming note to the Second Division of the " Court, who, on the 30th of October, 1884, allowed the parties " a proof before answer of their respective averments. The " learned judges, at the same time, decided that four of the " contracts specified in the summons, viz., the mineral lease of " March, 1836, the minute of April, 1853, the mill lands tack " of December, 1855, and the agreement of November, 1862, " were in terms assignable, and had been lawfully assigned by " the respondents. Against that decision, which was given effect " to in the subsequent interlocutor of the 27th of May, 1885, no " appeal has been taken. The proof allowed was led on the 2nd " December, 1884, before one of the judges of the Division." So I take it that the assignments in those four cases having been held to be binding on the landlord, the old company ceased to be liable, and there was no question, I assume, of setting anything aside. Again, that matter might possibly be cleared up by further research, but that is my assumption.

I will now read again from the report. " The case, which was " then confined to the agricultural lease of November, 1870, and " the minute of August and November, 1877, was again heard " along with the proof; and by interlocutor of the 27th of May, " 1885, their Lordships recalled the interlocutor of the Lord " Ordinary and dismissed the action. Lord Young, in whose " opinion the other judges concurred, was inclined to think that " the appellant had accepted the new company as assignees of " the contracts embodied in the lease of 1870 and agreement of " 1877, and that he could not therefore take action against the " respondents." That was, of course, certainly right if the appellant had accepted the new company as assignees. Then comes what is really the important passage: " But, inasmuch as he " was of opinion that no present debt or liability to the appellant

---

[49] 11 App.Cas. 332, 335.

"under either of these contracts had been averred or proved, his "Lordship preferred to abstain from deciding the point, and to "leave the appellant to prefer his claims in the liquidation. His "Lordship also expressed the opinion that the circumstances of "the case did not justify the appellant in resorting to an extra-"ordinary remedy for his security."

I am not quite sure what is meant by "extraordinary remedy "for his security." That, no doubt, could be cleared up if there exists any more extensive report. It may well mean that the appellant ought to try to prove and see what happened, and that to try to get the company interpelled was an extraordinary remedy. That is what seems to be the meaning.

The important point is that if he was able to prove at all or do anything it could only be because the original lessee, that is to say, the respondent company, was solely liable. There was no question of the respondent company and the assignee both being liable; that was not possible under the law of Scotland. Therefore, if he lodged a proof, it would have been on the footing that the assignment was invalid as against him or not binding on him, and if it was not binding on him then he could not look to the assignee for anything; to do that would have gravely prejudiced his position, because it would have involved recognizing the very assignment which he was disputing. Therefore, he could only look to the respondent company so long as he was contending that the assignment was not binding on him, and therefore his proof would have been on the footing that the original lessee or the intermediate lessee—because there is a difference between these two contracts—was solely liable.

It was that phrase "did not justify the appellant in resorting "to an extraordinary remedy for his security" which evoked the important passage in Lord Watson's speech on which Mr. Tucker so strongly relies. I must read it[50]: "I cannot assent to the "propriety of the course taken by the learned judges in dis-"missing the action, and leaving the appellant to renew his "claims in the liquidation. The appellant had preferred a claim "in the liquidation more than two years before the action was "instituted. He had, during the interval, made repeated "endeavours to get the liquidators to dispose of the claim, which "they declined to do, and ultimately recommended him to take "judicial proceedings. It was, in my opinion, inexpedient to

---

[50] 11 App.Cas. 336.

" send back the appellant, with his claim, to the liquidators, four " years after it had been submitted to them. If they had again " declined to entertain it, or if they had adjudicated upon it, " in accordance with the pleas they now maintain, the appellant " would have been under the necessity of raising a fresh action, " with conclusions substantially the same with those he now " insists in, for the purpose of enforcing what he conceives to be " his legal rights. When a limited company is in course of being " wound up voluntarily, I do not think a creditor, who is asserting " future or even contingent claims against the company, can " justly be said to resort to an extraordinary remedy when he " seeks to have the liquidators judicially interpelled from dividing " the surplus assets among the shareholders without making any " provision to meet his claims when they shall arise."

In my view, Lord Watson was there referring to the phrase used by Lord Young in the context in which it was used and in the circumstances in which it was used, and I do not understand him to have said that it was an absolute right of every future or contingent creditor to have a fund set aside without any regard to the circumstances. I do not think that he said that. But, if he had said it, it would have been obiter, and in my judgment, for the reasons which I have given already, it was an obiter dictum which I should not be willing to adopt.

The only thing that was decided in that case was that where there was no assignee liable a fund should be set aside. When I say " assignee " I am not treating the intermediate lessee as an assignee, and I think that the same applies to Lord Herschell's remarks [51]: " I cannot think that the learned judges in the court " below were right in dismissing the action. If any liability to " the appellant existed on the part of the respondent company " —and I would interpolate a sentence: " it was the sole liability " of the respondent company "; I am interpolating that—" he " was entitled to have provision made for it by the liquidators " before the assets of the company were distributed among the " shareholders."

I think that the interpolation which I have made is consistent with the sense and reasoning of the case, and I think that is all that Lord Herschell meant. But if he meant anything more, then again it is plainly obiter dictum, and I cannot possibly agree, with all respect to the suggestion made obiter in the judgment of the Court of Appeal which I have read, that it is not

[51] 11 App.Cas. 344.

1953

HOUSE PROPERTY AND INVESTMENT CO. LD., *In re.*

Roxburgh J.

possible to differentiate the case of *Elphinstone* [52] from other cases. To my mind the difference in the law—the circumstance that either the original lessee or the assignee is liable but not both—is a fundamental difference which may lead to different conclusions. I have no knowledge at all of what view would be taken in Scottish law now of *Elphinstone's* case,[52] as, of course, the introduction of the disclaimer and *Hardy* v. *Fothergill* [53] are binding in Scotland as well as in England, because the company law, I think, applies with minor modifications to both countries. I think that for reasons which I have given I ought not to regard that case as having any decisive effect in the law of England on the point which I have to determine.

Therefore, I find no absolute rule that when there has been an assignment for value a landlord is entitled as of right to have a fund set aside out of the assets of an original lessee who proposes to be dissolved to answer the liability of the original lessee under covenants in a lease. And I go further; I think that under present circumstances, particularly on the present state of the authorities and with the introduction of the right of disclaimer, it is very unlikely that any setting aside would be made in any future case, though I do not rule out that possibility.

Ought I, then, to make any such provision in the present case? It will not be forgotten that the rent under the lease is £5,000. The rack-rent is over £9,000. The lease was so far from being onerous that the liquidator realized £46,000 on its sale.

Looking at this case in isolation, it would be quite wrong to belittle the applicant's contention that, where the property is large and valuable and the rent high, though it is only a little more than half the rack-rent, still it might be a case in which something ought to be done for him in the way of setting a sum aside. I want to make it quite clear that I am dealing not with any question of what he ought to be able to prove for, but whether or not there ought to be a setting aside of a fund. It would, under no conceivable circumstance, in my view be or approximate to £200,000, but I am not going to go further than that. That seems to me to be, if I may say so, wholly unreasonable in the circumstances of this case. But I do not suggest that some provision by way of setting aside a fund would be unreasonable in this particular case, if I were to deal with the matter in isolation, but I cannot. In exercising my discretion, if I have one, I have to consider what the general effect of any such

[52] 11 App.Cas. 332.

[53] 13 App.Cas. 351.

procedure might be, because I emphasize that so far as I am aware this has never been done before where there has been an assignment for value. It is a very remarkable feature that, even when the liability stood as it did before 1877, so far as I know this has never been done in the case of an assignment for value. To start such a practice, when an assignor's liability has reached the position laid down in the Court of Appeal in 1936, would be to take a step which requires great circumspection in relation to its bearing on other cases.

If this practice were to begin, where would it stop? Supposing that the rack-rent was 20 times the ground rent; supposing, for example, that it was a true ground rent (this may not be a true ground rent; it may be that the value of the site devoid of buildings is not £5,000 per annum; I do not know, but I think that is very likely; and if it is not, it is not what I call a true ground rent; it is more than a ground rent). Equally plainly, it is not a true rack-rent or anything like one, that is to say, a full rent for the land and the buildings. Take the man who had a true ground rent, whose ground rent might be covered many times over. Is he to have a fund, and if not why not? If the man whose lease has 70 years still to run is entitled to a fund, what about the man who has 99 years? If he is to have one, what about the man who has 999 years to run, because I believe there are some such in small ground rents? Where would it stop? There is no difference in principle, though, of course, there is a difference in degree. If once this doctrine were incorporated in our law it would lend itself, not in this case, but in cases which would arise, to terrible abuse. It would put a person who was entitled to some quite nominal rent for a very long period of years in a position to exact from any company which wanted to go into liquidation preposterous sums of money. I want to make it plain, as I said before, that I am not dealing with the present case. I am considering what the result might be in other cases if I accede to this application, and I am bound to refer to these matters, because I have to consider other cases if I am going to lay down a new practice. It is, so far as I know, a new practice which Mr. Tucker is asking me to lay down. I think that, if the full implications of what Mr. Tucker asks me to do are realized, anybody must resile from it.

Secondly, I would like to refer again to section 302 of the Companies Act, 1948, for a different purpose. That, it will be remembered, provides: "Subject to the provisions of this Act as "to preferential payments, the property of a company shall, on "its winding up, be applied in satisfaction of its liabilities pari "passu, and, subject to such application, shall, unless the articles "otherwise provide, be distributed among the members according "to their rights and interests in the company."

It is the right of a company to wind itself up even though it is not insolvent, and this company certainly was not insolvent or anything approaching it, but it is its right; it is a statutory right. It is part of the policy of the law of England that a company should be able to wind itself up even though it is not insolvent. It is one manifestation of that wide branch of the law which abhors perpetuity. That, to me, is a feature of the greatest importance. Of course, a liquidator is not to distribute the property among the members before he has dealt with the liabilities. That is plain enough, but I am quite certain that, though it does not say so in express terms, the policy of the Act as expressed in that section carries the implication that he has to deal with the liabilities within a reasonable time, and deal with them finally within a reasonable time, and thereafter to distribute amongst the members within a reasonable time. I imply those words in that section from the general policy of the Act. Parliament cannot have contemplated liquidations of 999 years. Where is the line to be drawn? Of course, what is reasonable must vary according to the circumstances of the company. In some cases the time may be very long and still be reasonable, but in my view the policy of the Act would abhor an arrangement under which a liquidator had to continue his liquidation for 70 years in order to administer for the benefit of a landlord a fund created out of the assets of the original lessee, when the lease had been assigned for value, and was beneficial to the assignee, and the landlord presumably would be delighted to accept a surrender at any moment and under which the chance of any claim against the original lessee ever becoming a live claim for actual money is almost as remote as it could be. The rack-rent might, instead of being nearly twice as much, be 20 times as much.

It has been submitted that my fears are not warranted; that the liquidator could sell the reversionary interest in the fund. I have no doubt he could sell it for something, but for what? People do not usually like buying a property which is dependent on a contingency which will not be finally determined for 70 years, even though the contingency is remote. In other words, it is what conveyancers used to call a serious blot on the title. I do not believe myself that the reversionary interest in such a fund could be sold except at a sacrificial price. It is, however, a pure question of fact. I do not know, I may be wrong in my belief—it is a belief and not a finding that I am stating—but what I do know is that no evidence on this point has been given that it could be sold at a reasonable price, and in the absence of evidence I shall not presume that it could.

Therefore, from that point of view, it would be putting the company in a position of having to sacrifice a large sum of money in order to purchase the right to go into liquidation which the Act of Parliament confers upon it. And there is another matter. It has a statutory right to put itself out of a position to fulfil its future obligations. That position is now plainly visualized by sections 316 and 317 of the Act. In a sense, of course—and this has been naturally very much stressed—the original lessee, by dissolving itself, is breaking its contract, but it is entitled to break it provided that the Act is complied with when it breaks it. In other words, it is entitled to dissolve itself in accordance with the provisions of the Act and, in particular, sections 316 and 317.

What the applicant is saying is: " If you cannot comply with " the letter of your bond you must give me a better bond." What right has he to say that? " Better bond," not " compen- " sation " which nobody suggests he was not entitled to have. In other words, everybody admits and agrees that he is entitled to have compensation, but why should he have a better bond than the bond which he has already? In other words, why should he capitalize the circumstance that the company wants to do what it has a statutory right to do, namely, to go into liquidation?

I am going to explain that, because in this particular case it is not very obvious that he is capitalizing the situation. Indeed, he may not in the particular circumstances of this case be capitalizing it at all, for this reason: this was a very prosperous company and had very large assets on its liquidation, and it may be, for all I know, that the credit of the respondent company is as good as that of Her Majesty's Government; at any rate I am not in a position to say that it is not. What I wish to point out is that I am dealing here with a question of instituting a new practice, and if this practice applies to this very rich company why should it not also apply to a company which is just above the line of solvency, a company which has no credit at all or very little credit but yet has enough to pay off its creditors in the end and allow a small division among its shareholders? I want very much to stress this. I have been asked to institute a new practice. Consider a company which is just above the borderline of solvency: what is the value of that company's obligation? What would be—assuming that the present company is what it is not, one just above the borderline of solvency—the value of its obligations as an original lessee? I suggest none. Here you have property of which the rack-rent is nearly double the rent of the property which has been assigned. In those circumstances what would be the value of the covenant of an almost insolvent original lessee? I should have thought none. There is no security for the lessor vis-à-vis the original lessee company, while it is a going concern. Vis-à-vis the assignee, of course, the security is the property and a very real security it is, of course, though not in the legal sense a security. In the business sense it is a very real security. But vis-à-vis the original lessee there is no security because ex hypothesi it is a permitted assignment and the estate has passed away from the original lessee. Therefore, the landlord has no security and the unsecured covenant of an original lessee would in my opinion be of no importance whatever in a case of that sort.

I know that that is not the present case, but I am thinking of the practice which I am being asked to establish. What should I then have to do? Consider how solvent the company ought to be before a fund is established? I think that anybody would agree that in that case a fund would never be set up. Where am I to draw the line in principle between solvent and insolvent companies? Is the court to carry out an elaborate investigation into the value of the company's covenants in order to decide and then speculate as to what would be a just sum to set aside in the circumstances? I do not know, but it is this sort of reflection which leads me to say that under no circumstances would I set aside £200,000. If I ever started the practice, which I am not going to do, though other courts may, the question of how much the fund should be would always have to be a question of the facts of the particular case. I would never set aside a fund which would cover all the rent in a case in which it was unlikely that there would ever be a claim on the fund at all. But what principle I should adopt in settling how much the fund ought to be I have not the remotest idea. I have not, of course, dealt with any figures, and I am not now dealing with any figures, but it is the difficulties which would arise if I did introduce this practice which are weighing with me. For the reasons which I have given I decline to order the setting aside of any fund. There is no doubt, and it has been admitted throughout this case, that the applicant can prove in the liquidation if he so desires, and that is quite plain on the authority of *James Smith & Sons (Norwood) Ld.* v. *Goodwin*,[54] and in fact Mr. Bell has never questioned that. Whether he has any other remedy, I do not know; the summons does not ask. It asks in the first instance that he may have a fund set aside; that I refuse. It asks that he may have leave to prove and that the liquidation should not be completed. He has had an opportunity of proving and that has not been resisted. I do not know whether he has any other remedy. Insurance is very often a solution of this kind of problem, but both sides agree that in this case it is not a solution, because nobody will underwrite such a long standing affair, though the risk may not be much. That has some bearing on the question which I referred to as to what the value of the reversionary interest might be. But if he has no other remedy I for one shall not be shocked. It seems to me plainly the policy of the Acts that in such a case the claimant should prove. It is quite plain that he can prove, but whether he can do anything else or not the future only can tell.

Declaration accordingly.

Solicitors: *Rider, Heaton, Meredith & Mills; Slaughter & May; Julius White & Bywaters.*

J. L. D.

[54] [1936] Ch. 216.

A. & J. MUCKLOW LD. (IN LIQUIDATION) *v.* INLAND REVENUE COMMISSIONERS.

1954
May 17, 18, 19, 20;
June 3.

Evershed M.R., Jenkins and Hodson L.JJ.

Revenue—Surtax—Company—Company in liquidation—Broken period from accounting period to liquidation—Undistributed profits deemed available for distribution—Reasonableness of withholding income from distribution—Finance Act, 1922 (12 *&* 13 *Geo.* 5, *c.* 17), *s.* 21 (1)*—Finance Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 10), *s.* 31 (1), (4).

Judicial Precedent — Court of Appeal decision — Per incuriam — Ruling unnecessary to decision—Authority not cited—Later House of Lords' decision—Point not fully argued—Ratio decidendi.

On December 9, 1943, a company, which had at no time paid a dividend, went into voluntary liquidation for purposes of reconstruction, and shortly afterwards its business was sold to a new company

C. A.
1954

A. & J. MUCKLOW LD. (IN LIQUIDATION) *v.* INLAND REVENUE COMMISSIONERS.

of the same name. About £35,000 was excluded from the sale and was paid by the liquidator to the shareholders of the old company, who were also the only shareholders of the new company. A direction was made under section 21 of the Finance Act, 1922, in respect of the company's income during the broken accounting period from May 1, 1943, to the date of the winding-up resolution on December 9, 1943, and was confirmed both by the special commissioners and on appeal by Harman J., on the ground that on the facts the company had acted unreasonably in refraining from making a distribution and had not distributed a reasonable part of the income for the period in question:—

Held, (1) that the onus of proving that the company had acted unreasonably in withholding income from distribution was on the Crown (*Thomas Fattorini* (*Lancashire*) *Ld.* v. *Inland Revenue Commissioners* [1942] A.C. 643; [1942] 1 All E.R. 619; 24 T.C. 328), but since the special commissioners had found as a fact that income which was capable of being distributed had not been distributed, and that there was no sufficient reason for withholding it, the conclusion that the company had acted unreasonably in withholding income from distribution followed from those findings, which were based on sufficient evidence and were, therefore, conclusive.

(2) That the needs of the new company were not a relevant consideration in determining whether the company was justified in retaining funds.

Montague Burton Ld. v. *Inland Revenue Commissioners* (1936) 20 T.C. 48 followed.

Per curiam. The words "income . . . available for distribution" in section 31 (4) of the Finance Act, 1927, mean income which is capable of being distributed, not income which ought to be distributed, and, accordingly, where a company is in liquidation, the subsection does not impose automatic liability in respect of the income of the broken period, but leaves open the question whether there was any unreasonable withholding of it from distribution on the hypothesis that it was capable of being distributed notwithstanding the winding-up.

H. Collier & Sons Ld. v. *Inland Revenue Commissioners* [1933] 1 K.B. 488; 49 T.L.R. 46; 18 T.C. 83 not followed.

Young v. *Bristol Aeroplane Co. Ld.* [1944] K.B. 718; 60 T.L.R. 536; [1944] 2 All E.R. 293 applied.

Per Evershed M.R. Where the question involved is the question of fact whether a reasonable part of the company's income has been distributed it is plainly wrong that the question should not be investigated till years after the event. It is further essential that the commissioners' findings of fact should be expressed in clear and unambiguous language and that in particular it should not be left in doubt whether or to what extent evidence is accepted.

Decision of Harman J. affirmed.

APPEAL from Harman J.

This was an appeal from a judgment of Harman J. dated

C. A.
1954

A. & J. Mucklow Ld. (in liquidation) v. Inland Revenue Commissioners.

November 17, 1953, affirming a decision of the special commissioners, which upheld a direction made against the appellant company, A. & J. Mucklow Ld. (in liquidation), under section 21 of the Finance Act, 1922,[1] and section 31 of the Finance Act, 1927,[1] to the effect that the actual income of the company from

---

[1] Finance Act, 1922, s. 21: "With a view to preventing the avoidance of the payment of super-tax through the withholding from distribution of income of a company which would otherwise be distributed, it is hereby enacted as follows:—

"(1) Where it appears to the Special Commissioners that any company to which this section applies has not, within a reasonable time after the end of any year or other period ending on any date subsequent to the fifth day of April, 1922, for which accounts have been made up, distributed to its members in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of super-tax, a reasonable part of its actual income from all sources for the said year or other period, the Commissioners may, by notice in writing to the company, direct that for purposes of assessment to super-tax, the said income of the company shall for the year or other period specified in the notice, be deemed to be the income of the members, and the amount thereof shall be apportioned among the members.

"Provided that, in determining whether any company has or has not distributed a reasonable part of its income as aforesaid, the Commissioners shall have regard not only to the current requirements of the company's business but also to such other requirements as may be necessary or advisable for the maintenance and development of that business."

Finance Act, 1927, s. 31: "(1) Subsection (1) of section 21 of the Finance Act, 1922, shall have effect as if at the end thereof there were added . . . the following: For the purpose of this subsection any such sum as is hereinafter described shall be regarded as income available for distribution among the members of the company and not as having been applied or being applicable to the current requirements of the company's business or to such other requirements as may be necessary or advisable for the maintenance and development of that business, that is to say:—

"(*a*) Any sum expended or applied, or intended to be expended or applied, out of the income of the company, otherwise than in pursuance of an obligation entered into by the company before the fourth day of August, 1914—

"(i) in or towards payment for the business, undertaking or property which the company was formed to acquire or which was the first business, undertaking or property of a substantial character in fact acquired by the company; or

"(ii) in redemption or repayment of any share or loan capital or debt (including any premium on such share or loan capital or debt) issued or incurred in or towards payment for any such business, undertaking or property, or issued or incurred for the purpose of raising money applied or to be applied in or towards payment therefor; or

"(iii) in meeting any obligations of the company in respect of the acquisition of any such business, undertaking or property; or

"(*b*) Any sum expended or applied, or intended to be expended or applied, in pursuance or in consequence of any fictitious or artificial transaction."

"(4) Where an order has been made or a resolution passed for the winding-up of a company to which all sources, for the period from the close of the last complete financial year of the company on April 30, 1943, to the commencement on December 9, 1943, of the voluntary winding up of the company, should be deemed to be the income of its members, and consequently be apportioned among such members for the purposes of their assessment to surtax, the only members of the company being two brothers named respectively Albert and Jothan Mucklow.

The facts are fully stated in the judgment of Jenkins L.J.

Millard Tucker Q.C. and *G. B. Graham* for the company. Section 21 of the Finance Act, 1922,[1] was directed against the avoidance of super-tax; the present case is not within the mischief of the section for the commissioners found that the reconstruction scheme was not a device to avoid tax.

Under section 21 the special commissioners may make a direction on the whole of the undistributed income if the company has unreasonably failed to distribute any part of it, however small that part. The power of direction is not limited to the part which ought reasonably to have been distributed. That is why in *Thomas Fattorini (Lancashire) Ld.* v. *Inland Revenue Commissioners*,[2] Lord Atkin described section 21 as being of a "highly penal nature." *Fattorini's* case [2] shows that, to prove that the company acted unreasonably in withholding income from distribution, the Crown must show not only that there was a balance of income in hand for that period, but also that a reasonable part was not distributed. In reaching that conclusion they must consider the liabilities of the company. The income which is unreasonably withheld must be, in the words of the

"the said section 21 applies, the "income of the company for the "period from the end of the last year "or other period for which accounts of "the company have been made up to "the date of the order or resolution "for winding-up shall, for the pur"poses of the said section, be deemed "to be income of that period avail"able for distribution to the members "of the company, and, as respects "that period and the next preceding "year or other preceding period or "periods ending within that next pre"ceding year for which accounts have "been made up, the said section shall "apply as if the words 'within a "'reasonable time' in subsection (1) "of the said section were omitted "therefrom.

"(5) Any notice required under the "provisions of the said section 21 "to be served upon a company may, "where the company is in liquidation, "be served upon the liquidator of the "company, and the liquidator shall "be responsible for doing all matters "or things required to be done by or "on behalf of the company, and the "liquidator shall be responsible for "the due payment of any super-tax "payable by or recoverable from the "company under the provisions of the "said section."

[2] [1942] A.C. 643; [1942] 1 All E.R. 619; 24 T.C. 328.

preamble to section 21, "income which would otherwise be "distributed." That makes it clear, as Harman J. said, that the circumstances mentioned in the proviso to section 21 of the Act of 1922 do not provide the exclusive test of what is reasonable for this purpose. For example, it may be that a company has past accumulated losses which would make it unreasonable to declare a dividend in a year when the company happens to have made a profit. The proviso specifies certain matters which the commissioners have to take into account, but they have also to consider any other commercial matters which would be present to the minds of the directors sitting in the board room of the company. Contrary to the view which Harman J. expressed, account could and should be taken of the needs of the new company, for there was continuity of the company's business here.

Under section 21 it was open to the company to say that, because of liquidation, income which would otherwise have been available for distribution, was no longer available. Section 31 of the Act of 1927 [1] provides for the position after liquidation has intervened, and provides that income for the broken period is to be deemed available, although in fact it could only be distributed after the period if the company had declared a dividend before going into liquidation, which became payable after liquidation commenced, and such a dividend would only be payable then provided payment would not be in competition with the creditors of the company. Section 31 provides, in other words, that the income of the broken period is to be deemed to be capable of being distributed, notwithstanding the practical difficulties. But section 31 is still subject to the preamble to section 21 of the Act of 1922, and the income must be "income which would "otherwise be distributed." It is inadmissible to start with the assumption that if section 31 (4) applies, direction is automatic unless and until the company shows good reason why the income was not distributed. *H. Collier & Sons Ld.* v. *Inland Revenue Commissioners* [3] is not a binding authority to that effect. It is submitted that the judgments of the majority do not go to that length, or if they do, they are to that extent obiter, for the question was not before the court. The judgment of Romer L.J. clearly does not support the view that direction under section 31 (4) is automatic.

The contention on behalf of the company is that the original finding by the commissioners on the facts (which was not withdrawn by them on their further finding) was correct. "Reasonable" must be given its ordinary meaning; it is not limited by the statutory provisions. There is no affirmative evidence here that the company acted unreasonably, and the commissioners found that the reconstruction was not a device to avoid tax. To carry out the reconstruction the concurrence of the shareholders of the old company had to be obtained. They wanted the scheme to go through. The money would be available for the purposes of the new company, and unless it was available the reconstruction could not be carried out. This is a perfectly proper transaction and a reasonable thing for the company to do. With regard to the penultimate period it was held that it was reasonable not to declare a dividend, and in normal circumstances it would not have occurred to anyone to declare a dividend for the broken period. The company does not contend that they could not notionally have made a distribution, but that it would not be unreasonable not to do so.

---

[3] [1933] 1 K.B. 488; 49 T.L.R. 46; 18 T.C. 83.

[Evershed M.R. Would a company be in a worse position if it distributed a part of its income but not a reasonable part, than if it had distributed nothing at all?]

That might be so. A distribution might in some cases cause the onus of proof to shift to the detriment of the company, but that is not the present case.

Heywood Talbot Q.C. and *Sir Reginald Hills* for the Crown. By section 21 of the Finance Act, 1922, the commissioners are empowered to direct if they are of opinion that a company has not distributed a reasonable part of its income. In reaching their conclusion they are to have regard to the requirements referred to in the proviso. Section 21 does not refer to "income "available for distribution." That expression was introduced by section 31 of the Finance Act, 1927, and it is used in subsections (1) and (4) of section 31 as a convenient formula for the income which does not fall within the proviso to the original section. The statutory scheme is, therefore, to divide the company's income into two groups, first that which is within the proviso to section 21 of the Act of 1922, as amended by section 31 (1) of the Act of 1927: this income can reasonably be withheld from distribution. The second group is the remainder of the income, together with income excluded from the proviso to the original section by subsection (1) of section 31 of the Act of 1927. Prima facie it is not reasonable to withhold the second group from distribution; this income ought to be distributed. The legislature had not in mind a tertium quid, and the proviso as amended covers the whole field of income which can reasonably be withheld. Consequently, if it be shown that there is income for the broken period which has not been distributed, and which is not required for the purposes specified in the proviso to section 21, direction under section 31 is automatic, and it is for the company to show, if it can, why it is unreasonable to say that the income should not be distributed. Theoretically, there may be some reason why it would be imprudent to distribute income which is not required for current or future needs within the proviso, but as the income with which the section is concerned represents what is available after, for example, any accumulated past losses have been allowed for, such cases would necessarily be rare.

In the present case the income for the broken period has not become notionally available for distribution by virtue of subsection (1) of section 31 of the Act of 1927; it was never within the scope of the proviso to the original section 21.

Reliance has been placed by the company on wording in later enactments where imperative directions are given in clear terms. It may be that the technique of drafting has improved with time, and it is admitted that section 31 is not, perhaps, happily expressed. These are, however, irrelevant considerations, and the later enactments cannot be invoked to construe the earlier provision.

Collier's case [3] is a binding authority and supports this interpretation of section 31 of the Act of 1927. The company has sought to show that the point was not argued before the court in that case, and it is, of course, conceded that the Crown was not called upon to argue it, but the decision is not the less authoritative because the court took the view that the point was too clear to require argument. The opposite interpretation was, indeed, argued by Mr. Burrows Q.C. It was also argued in the court below before Finlay J. It is, therefore, incorrect to say that the point was not before the Court of Appeal. But even if the point had not been argued and was not before the court, it is submitted that the opinions of Lord Hanworth M.R. and Slesser L.J. would have great persuasive weight and that this court would be slow to reject them, particularly as *Collier's* case [3] has been acted on for many years. It is submitted that both Lord Hanworth M.R. and Slesser L.J. regarded section 31 (4) as peremptory, and Romer L.J. said nothing which indicated that he took an opposite view, though he disposed of the case on other grounds.

If, however, it is held that section 31 (4) is not mandatory, and that the commissioners have a discretion to decide whether, on the facts, the company have, or have not, acted reasonably in not distributing income for the broken period, the proviso to section 21 of the Act of 1922 must be again invoked to decide what is reasonable. "Reasonable" cannot in this provision be defined by commercial standards divorced from the statutory context. The discretion must be exercised by reference to a standard which is intelligible, having regard to the statutory scheme. The proviso to section 21 gives an indication that though it is reasonable to withhold from distribution income which is required for present or future needs, it is unreasonable not to distribute income which is not so required. On the basis of the proviso the commissioners found that this company had no requirements which made it reasonable to retain income because the requirements for which funds may be retained within the proviso are those of the company's business, and that business ceased when it was sold to another company. The requirements of the new company cannot be regarded as requirements of the "company's business" within the proviso, and the requirements of the new company as such are, of course, wholly irrelevant. See *Montague Burton Ld.* v. *Inland Revenue Commissioners.*[4]

---

[3] [1933] 1 K.B. 488.

The commissioners have made a finding of fact on this point which, as Harman J. held, is conclusive in favour of the Crown. They were rightly directed in reaching that conclusion and they observed the direction.

The revenue authorities have shown that there is income of the broken period which was available for distribution, and they have then considered what reason, if any, there could be for withholding income from distribution which was in any way comparable with the reasons which the statute indicates would be regarded as being reasonable. They were unable in the case of a company in liquidation to find any such reason. They have, therefore, established a prima facie case against the company, and the onus of proof which, as *Fattorini's* case [5] shows, was first on the Crown, has now shifted to the company, to show, if they can, that, contrary to all expectation there was some commitment which made it unreasonable to declare a dividend. This statute has been described as of "a penal nature," but this is not a criminal case and the Crown has done all that could be reasonably required to shift the onus.

Millard Tucker Q.C. in reply. It is not correct to say that the commissioners' original finding of fact that retention was not unreasonable was divorced from the statutory scheme. All that they were saying was that, if they could look at the question without regarding the proviso as furnishing the exclusive test of what was reasonable (and it is not the exclusive test: see *Montague Burton Ld.* v. *Commissioners of Inland Revenue*[6]), and if they were not bound by the assumption that direction under section 31 (4) was automatic, then they would have held that it was not automatic.

---

[4] (1936) 20 T.C. 48, 73, 77.

[5] [1942] A.C. 643.

The phrase "income available for distribution" was introduced to deal with the position where a company has gone into liquidation with the result that a dividend could not normally be declared or paid. In spite of practical difficulties, income of the broken period and the penultimate period was to be deemed available for distribution without any "reasonable" period of grace. It is inconceivable that the legislature would have imposed an automatic liability irrespective of any test of reasonableness. This would have meant that the directors would have had to estimate exactly the income for the broken period before it had concluded, for it would be too late to do anything about it after liquidation had once commenced, and they would have had to declare a dividend which exactly absorbed the surplus income for if they had made any mistake they would be liable to a direction.

If it had been intended that direction under section 31 (4) was to be automatic it would have been simple to have said so in appropriate clear terms: cf., section 14 of the Finance Act, 1939,[7] which can be contrasted with section 14 of the Act of 1937[7] where "available for distribution" clearly has its primary meaning of "capable of being distributed." The provisions in the First Schedule to the Act of 1922, as amended by section 31 (7) of the Act of 1927, would be inappropriate if liability was automatic. Further, section 18 of the Act of 1928 (amending the procedure of section 21 of the Act of 1922) contains nothing appropriate to automatic liability. Where automatic liability is expressly stated it is significant that these procedures are expressly excluded.

---

[6] 20 T.C. 48, 76.

[7] Finance Act, 1939 (2 & 3 Geo. 6, c. 41), s. 14: "(1) Subject to the provisions of this section with respect to companies with estate or trading income, the whole of the actual income from all sources, for every year of assessment, of every investment company to which section 21 of the Finance Act, 1922, applies shall, however much or little thereof has been distributed to its members, be deemed for the purposes of assessment to surtax to be the income of the members of the company, and accordingly the Special Commissioners shall give a direction under subsection (1) of the said section 21 in respect of each year of assessment . . . whether or not the company has distributed a reasonable part of its said income."

Finance Act, 1937 (1 Edw. 8 & 1 Geo. 6, c. 54), s. 14 (2) (*b*): "In determining for the purpose of this subsection whether the company has or has not distributed as aforesaid a reasonable part of its actual income from all sources for any year of assessment, the Special Commissioners shall deem all the said income to have become available for distribution as soon as it became due and payable to the company."

In *Collier's* case[8] it was not contended that direction under section 31 (4) was automatic. The point was first taken by Slesser L.J. intervening in the argument, and though Mr. Burrows Q.C. sought to challenge it, he probably did not do so as fully as he would have done if it had been fully argued. In his judgment Slesser L.J. was clearly of opinion that direction under section 31 (4) was automatic but, in reaching that conclusion, he proceeded on the footing that under the original section 21 the power of direction applied only to the part of the income which ought reasonably to have been distributed; whereas in *Colville Estate Ld.* v. *Inland Revenue Commissioners*,[9] a decision which was approved by the House of Lords in *Fattorini's* case[10] but which was not cited to the court in *Collier's* case,[11] it was decided that the power of direction applied to the whole of the undistributed income. Having regard to section 31 (5) it is submitted that that error went to the root of the judgment of Slesser L.J. and vitiates it. See also *David Carlaw & Sons Ld.* v. *Commissioners of Inland Revenue*.[12] Romer L.J. in *Collier's* case[13] did not commit himself on this point: the judgment of Lord Hanworth M.R. is not clear; he nowhere said in terms that direction under section 31 (4) was automatic, but if he was taking the same view as Slesser L.J. then his judgment is vitiated by the same fundamental error. In that case, the judgment of the majority is subject to review on the principle of *Young* v. *Bristol Aeroplane Co. Ld.*[14] If, on the other hand, it is incorrect to attribute this view to Lord Hanworth M.R., then the judgment of Slesser L.J. stands alone.

Cur. adv. vult.

June 3, 1954. EVERSHED M.R. (reading his judgment) read section 21 (1) of the Finance Act, 1922, and continued: That section was amended by section 31 of the Finance Act, 1927. [His Lordship read section 31 (4), and continued:] It is not in doubt that the company, A. & J. Mucklow Ld., was at all relevant dates a company to which section 21 of the Act of 1922 applied. The company went into voluntary liquidation on December 9, 1943. Directions were made as contemplated by the section (a) in respect of the company's last full financial year which ended on April 30, 1943, and (b) in respect of what has been called the "broken period" from May 1 to December 9, 1943. The company appealed against both these directions to the special commissioners, who discharged the first direction (relating to the year ended April 30, 1943) and the Crown have not challenged the propriety of the discharge. As regards the broken period, the commissioners confirmed the direction but, at the company's request, stated their conclusion in the form of a case stated.

---

[8] [1933] 1 K.B. 488.
[9] [1930] 2 K.B. 393; 15 T.C. 485.
[10] [1942] A.C. 643.
[11] [1933] 1 K.B. 488.
[12] 1926 S.C. 870; 11 T.C. 96.
[13] [1933] 1 K.B. 488.
[14] [1944] K.B. 718; 60 T.L.R. 536; [1944] 2 All E.R. 293.

Harman J., before whom the case came, was uncertain whether or to what extent the commissioners had based their conclusion on the view that, in the case of a broken period up to a company's liquidation, a direction, once given, operated necessarily and automatically to the full extent of the income treated as available, or on the further view that *H. Collier & Sons Ld.* v. *Inland Revenue Commissioners*,[1] in this court so decided. Harman J., being of opinion (for which he stated his reasons) that section 21 (as amended) did not make a direction relating to a broken period so inescapable or "automatic" and that *Collier's* case[1] was not a binding authority to that effect, referred the matter back to the commissioners. They, after a further review of a number of relevant matters and considerations, reported to the judge in paragraph 7 of their report of finding: "After carefully considering the whole "of the facts we are unable to find any circumstances or com-"bination of circumstances making it reasonable for the company "to refrain from making a distribution. We therefore conclude "that the company acted unreasonably in so refraining, and we "find that it did not distribute 'a reasonable part of its actual "'income' for the period in question." In the opinion of Harman J. this was a finding of fact justified by evidence and not disqualified by any misdirection in law. He therefore dismissed the company's appeal.

It will have been noticed that the period with which we are concerned is that from May 1 to December 9, 1943, a period beginning more than 11 years ago. It is indeed nearly four years since the validity of the two directions came before the special commissioners. I am not criticizing anyone concerned at any stage; for I have no grounds on which to base any criticism, other than the mere fact of the passage of the years. Both Mr. Millard Tucker and Mr. Heyworth Talbot regretted the delay. Where the question involved is (as I assume it for the moment to be) the question of fact, aye or no has a " reasonable " part of the company's income been distributed, it is so plainly wrong (and not less wrong though both parties were content) that such a question should not be investigated till years after the event—when some of the witnesses might indeed be no longer available—that I have felt bound to draw attention to so remarkable a lapse of time.

---

[1] [1933] 1 K.B. 488; 49 T.L.R. 46; 18 T.C. 83.

I have also been somewhat disturbed by the form of the case and the later report of finding. In those documents the commissioners touched upon a number of matters and considerations, and I am not satisfied that all of them were pertinent to the question to be determined. In any case Harman J. was, at the first hearing before him, left sufficiently uncertain of the commissioners' intention on matters of fact for him to refer the case back to them; and on the second hearing, both the company and the Crown were able to contend that the commissioners' findings were in their own favour. I hope I shall in the circumstances be forgiven if I emphasize, in cases of this character, the advantage and desirability of clear expression by the commissioners of their findings of fact; and I venture to add that if the method is adopted of reciting the effect of a witness's evidence, the conclusion on the commissioners' part that the evidence is accepted " with a grain of salt," though lively as a form of expression, leaves an appellate court uncertain whether or to what extent the evidence should be treated as having been rejected.[2] In the present case the costs of two hearings before the commissioners, two hearings before the judge, and one hearing of several days in the Court of Appeal, have eventually to be borne by one party or the other.

I have said that the case stated touched upon many matters of fact. To my mind, the essential facts are these. During the short life of about four and a half years, during which the company's activities were, inevitably, restricted by the war, its resources, nevertheless, greatly increased. No dividends were ever declared and on April 30, 1943, the accumulated balance to the credit of the company's profit and loss account was over £145,000. It has been decided that the uncertainties and possible requirements of the future justified the two brothers, who were the sole directors and shareholders, in their decision to make no distribution for the year then ended. During the period from May 1 to December 9, 1943, a further sum of profit was earned of over £14,500, which amount must (it is conceded) be treated as having been, within the terms of section 31 (4) of the Finance Act, 1927, " available for distribution to the members " in respect of that broken period. The bulk of the company's assets were then sold to a new company (A. & J. Mucklow & Co. Ld.) having somewhat wider objects than those of the selling company. The whole of the consideration for the assets sold was distributed to the two shareholders and used by them in taking up shares in the new company; but there was excluded from the sale cash (or its equivalent) amounting to £35,000, and this sum was also paid by the liquidator to the two shareholders who " put it on " deposit to guarantee an overdraft of the new company." We were informed that the whole sum still remains so deposited; but it always was, and is, the property of the two brothers, and there is not any evidence that it was any part of the terms of the sale that that sum, or any sum, should be provided to secure the new company's banking account.

---

[2] " Evidence which we accepted " was given by Mr. Albert Mucklow " to the following effect. . . As to " the formation of the new company, " the witness said it was the only " time that he had seen his brother, " whom he called the pessimist, act " fast. We accepted this with a " grain of salt."

If, therefore, the commissioners found and intended to find as a fact that, of the £14,500 income of the broken period available for distribution, the company did not distribute a reasonable part, there was plainly, in my judgment, evidence to support such a finding; and I agree with Harman J. that the commissioners did so find and intended so to find. Nor do I think that there was any material misdirection on their part. The commissioners had found in the company's favour as regards the financial year ended April 30, 1943. They also acquitted the company and its directors of having deliberately sought to avoid surtax, but rightly regarded that fact, notwithstanding the terms of the preamble to the section, as not being conclusive. On the other hand, it is clear from their report of finding that they had in mind, as regards onus of proof, the speech of Lord Atkin in

Thomas Fattorini (Lancashire) Ld. v. *Inland Revenue Commissioners.*[3] They followed the directions given to them by Harman J. in his first judgment that the circumstances mentioned in the proviso to section 21 (1) of the Act of 1922 were not intended to be exhaustive, that the "direction" was not inescapable or mandatory, and that *Collier's* case [4] did not require them so to regard it; and finally, they took the view (as Harman J., in my opinion rightly, had intimated to them) that a mere desire on the part of the two director-shareholders to support or to be able to support the needs of the new company—if and so far as it was present to their minds—was an extraneous and irrelevant consideration. In these circumstances I cannot regard the final paragraph of their report (which I have already cited) as otherwise than a clear and also a justifiable, and therefore conclusive, finding of fact adverse to the company within the meaning of section 21 of the Act of 1922, as amended.

I have had the advantage of reading the judgment about to be delivered by Jenkins L.J., who has set out more fully the relevant facts. I respectfully adopt my brother's reasons for dismissing the present appeal on this short ground, and I do not desire further to elaborate my own.

The result is sufficient to dispose of the appeal. The further point, however, was taken by the Crown and fully argued before us (to which some reference has already appeared), namely, that in the case of the broken period ending with the liquidation of a company within section 21 of the Finance Act, 1922, the effect of the amending subsection (4) of section 31 of the Finance Act, 1927, is to render a direction once given inescapable, or (to use the words used during the argument) "mandatory" and "automatic." It was, that is to say, argued by the Crown that the provisions of the original section, expressed to create liability for taxation only when the company was shown not to have distributed a reasonable part of its income, were inapplicable in the case of a direction relating to a broken period—such direction ipso facto creating liability to taxation in respect of the whole income. It was, moreover, contended by the Crown that we were in any case bound so to hold by the judgments of the majority of this court in *Collier's* case.[4] As both these contentions have raised matters of general importance I have thought it desirable to give my reasons, in agreement with Harman J., for rejecting both of them.

---

[3] [1942] A.C. 643; [1942] 1 All E.R. 619; 24 T.C. 328.

[4] [1933] 1 K.B. 488.

The first contention rests upon the view that the phrase "deemed to be income . . . available for distribution to the "members" means in its context "income which ought to have "been distributed." I have (with all respect to two of the judgments in *Collier's* case,[4] and to the arguments of counsel for the Crown) been wholly unable to accept this argument. The relevant amendments introduced into section 21 of the Act of 1922 by section 31 of the Act of 1927 were clearly designed to prevent avoidance of the impact of the former section by the expedient of liquidation. The conception of the income earned up to the date of liquidation being "deemed to be available for "distribution" is no doubt artificial: for unless the company and its directors resolve before actual liquidation to make a distribution by way of dividend, it will be too late afterwards. And as a practical matter it will (in many cases at least) not be easy to see on what grounds of the kind contemplated by the original section a company on the eve of liquidation will reasonably have declined to make any distribution. Nevertheless, I confess that I have been unable to see any ground in the context for construing the formula used in section 31 (4) of the Act of 1927—a formula commonly used and well understood in relation to company matters—in other than its ordinary sense, that is, income which the company can in fact, and properly, pay out by way of dividend to its members.

The formula is twice introduced by the amending section 31. By subsection (1) (which I quote more fully hereafter) it is provided, by way of qualification to the proviso in subsection (1) of the original section, that income applied or applicable for certain specified purposes (which might otherwise be regarded as bringing the income within the scope of the proviso) should be deemed to be available for distribution, so that its non-distribution in fact cannot be justified as falling within the proviso. In this instance I can see a somewhat more forceful argument for suggesting that the formula is being used otherwise than strictly in its ordinary meaning, but the argument is not, in my judgment, strong enough; certainly not strong enough to give to the phrase an unusual and special meaning in subsection (4).

If Parliament had intended by the amendment to create an "automatic" liability for tax, it would surely have sought—and found without difficulty, for example by reference to the preamble

[4] [1933] 1 K.B. 488.

to the original section itself—appropriately clear language. Our attention was drawn to more than one instance in later statutes in which such an intention has been clearly expressed. Thus by section 14 of the Finance Act, 1939, concerning "investment "companies," it is provided in unambiguous terms that "the "whole . . . income . . . shall . . . be deemed for the purposes of "assessment . . . to be the income of the members of the company." Mr. Heyworth Talbot attributed these instances of clear language to mere improvement in drafting technique; and I am not seeking to construe the language of an Act of 1927 by invoking the terms of later enactments. But to the somewhat cynical argument of the Crown one answer appears to me to be that, in an enactment described by Lord Atkin in *Fattorini's* case [5] as penal in its effect, clear language is required to impose liability: and I should be loth to derive obliquely from language which, ordinarily understood, could not have so far-reaching an effect, a result which I venture to think would occur to no one on a first reading, and which would have the somewhat capricious consequence that those against whose companies a direction had been made would have no answer or effective means of challenge, while others would escape liability for no better reason than that, in their cases, no direction had in fact been made.

Mr. Tucker sought further to meet the Crown's argument by a close analysis of the "mechanics" contained in the First Schedule to the Act of 1922 as amended, contending that those provisions were wholly inconsistent with the view that a "direction" once made as regards a broken period was "automatically" effective and left no room for challenge on the part of the taxpayer. In the circumstances, I have not found it necessary to pursue the matter into these legislative by-ways. I therefore express no view upon them save to say that, as at present advised, I doubt whether these "mechanical" provisions carry the matter further one way or another, for I am not satisfied that the "other periods" mentioned (which, according to Mr. Tucker, referred to, or at least included, "broken periods" of the kind under consideration) do more than include periods, not being yearly periods, in respect of which companies carrying on as going concerns may make up their accounts. I therefore reject Mr. Heyworth Talbot's argument based on the construction of the relevant sections—if I am free so to do.

That leaves the further question—and, in my opinion, the much more difficult question—what precisely was decided by *Collier's* case,[6] and whether, having regard to the principles stated by this court in *Young* v. *Bristol Aeroplane Co. Ld.*,[7] that decision is now binding on this court. *Collier's* case [8] was like the present in that, before Finlay J. at first instance and the Court of Appeal, only the income of the "broken period" was in question. That "broken period" was from immediately after the end of the company's last financial year on September 1, 1928, until the date of the company's going into liquidation on December 20, 1928. There was, however, one special feature in the case around which the whole of the argument of the appellant company (for the Crown were not called upon to argue) turned in the Court of Appeal, namely, that on November 16, 1928, the company had agreed to sell its assets and undertaking to the purchasing company, and it was part of that contract (by clause 8) that the company should from the close of business on August 31, 1928, be deemed to have been and to be carrying on the business on behalf of the purchasing company. The Crown made no claim in respect of the company's income from and after the date of the contract (November 16). The contest was confined to the period from September 1 to November 15 inclusive.

---

[5] [1942] A.C. 643.

The appeal of the company against the "direction" made upon the company had, pursuant to the First Schedule to the Finance Act, 1922, gone for hearing before the board of referees, and from the board (which confirmed the direction) upon a case stated to Finlay J. The terms of the case stated are fully set out in the reports.[9] The contentions of the company and the Crown were set out in the case and I shall later return to them.

Finlay J. decided the case adversely to the company on the simple ground that whether the company had "not . . . "distributed . . . a reasonable part" of its actual income was a question of fact which the board had decided on evidence and had, therefore, conclusively decided against the company. It seems to me manifest that Finlay J. did not regard a direction in respect of a broken period as per se conclusive, though he did not decide the case on that ground. I am content to repeat the citation taken by Harman J. from the report in Tax Cases [10]: "You get the winding-up resolution on December 20, and there- "upon the section says that the income of the company for the "period from the end of the last year shall, for the purposes of

---

[6] [1933] 1 K.B. 488.

[7] [1944] K.B. 718; 60 T.L.R. 536; [1944] 2 All E.R. 293.

[8] [1933] 1 K.B. 488.

[9] Ibid. 489; 18 T.C. 83, 84.

[10] 18 T.C. 83, 96.

"the section, be deemed to be income available for distribution "to the members of the company. That does not, of course, "mean that you are, without any more examination, to say that "it has become obnoxious to the section. What it means is that "it is income which you are entitled to treat as income of the "company and, therefore, as income which, if the other conditions of the section are fulfilled, that is to say, if there has "been what I may call the unreasonable withholding of it, is "income as to which the appropriate machinery may be brought "into operation."

The report in the Law Reports [11] sets out the argument of counsel for the appellant company, which fell into two parts. The first part was to this effect: that the question under section 21 of the Act of 1922 (as amended) fell to be determined at the end of the broken period, namely, on December 20, 1928; and that on that day there was no income capable of being subject to a valid direction, for the company had, on the previous November 16, parted wholly with it from September 1 onwards. At that point in the argument Slesser L.J. is reported as interjecting the question (in effect): "Do not the terms of section 31 (4) of "the amending Act require the conclusion that the income of the "period is to be deemed income available for distribution?" Counsel then passed to the second part of his argument—namely that, accepting Slesser L.J.'s inference from the terms of the section, still, having regard to the contract, it could not at the end of the period have been reasonable to distribute any part of such income.

I have already observed that the court dismissed the appeal without calling upon the Crown to argue. The court consisted of Lord Hanworth M.R., Slesser and Romer L.JJ., of whom the last named clearly, as I think, rested his conclusion on the same ground as had Finlay J. After observing that in his opinion the words of section 31 (4) of the Act of 1927 were too strong for the appellant company's counsel, he said [12]: " . . . All we have to "consider is whether it was open to the Board of Referees to come "to the conclusion that a reasonable part of that income had not "been distributed to the members. As the income is to be "deemed to be income available for distribution to the members, "and on that hypothesis there was no conceivable reason why "the income should not have been distributed amongst the "members, it is clear that the Commissioners could find, as they

---

[11] [1933] 1 K.B. 488, 496.

[12] Ibid. 505.

"did in fact find, that it was unreasonable not to have so distributed it: in other words, that a reasonable part of that income "had not in fact been distributed amongst the members."

Respectfully agreeing, as I do, with the view of the construction of the relevant parts of section 21 of the Act of 1922 and section 31 of the Act of 1927 which underlies the conclusion of Romer L.J., I add only that his reasoning appears no less applicable to the present case. There is no hint or trace of acceptance by Romer L.J. of the argument that, in the case of a broken period, a direction is "automatic" or inescapable. But did Lord Hanworth M.R. and Slesser L.J., on the contrary, so hold?

With every respect to Lord Hanworth's judgment, I am bound to say that I find it, as did Harman J., somewhat obscure; and if he took the view attributed to him, at least he nowhere said so in terms. On the other hand, I think that it is impossible to avoid the conclusion that Slesser L.J. did deliberately so conclude.

It seems to me clear that Slesser L.J. regarded the formula "income available for distribution" as meaning, according to its ordinary usage, or at least in the context of section 31 of the Finance Act, 1927, not only available, that is "capable of being "properly distributed," but also which ought to have been distributed. Thus, in the second paragraph of his judgment he said [13] that if the phrase was to be read in its ordinary meaning "the direction is clear"—which, I think, must mean "the "commissioners' direction is mandatory." So at the end of his judgment, after considering the possible case in which any distribution would be "unlawful" (upon which he expressed no view) he concluded [14]: "He" (that is, Finlay J.) "seemed to be of "opinion that the commissioners must still consider what was a "reasonable part of the income for distribution under the Act "of 1927, and decided the case, as I understand him, as a "question of fact. Because I have arrived at a different view of "the law on that matter, and agree with the Master of the Rolls "in thinking that the words of subsection (4) are to be read in "the sense which I have indicated, I have thought it right in "courtesy to the learned judge to give full expression to my "opinion."

By the passage last cited, Slesser L.J. is rejecting altogether the necessity of applying, in the case of a broken period, any test of reasonableness. He is, however, also attributing to Finlay J. the view that the commissioners had the positive duty of discovering what was the reasonable part of the income which the company ought to have distributed—an attribution which shows, as later appears, that the Lord Justice had fallen into an error, and an error which I think went to the root of his judgment.

---

[13] [1933] 1 K.B. 488, 502.

[14] Ibid. 504.

I have already given my reasons for thinking that the phrase "income available for distribution" means no more and no less than what it says, and, with all respect to Slesser L.J., I have been unable to see how its "natural or ordinary" meaning can be other than I have stated. But has it a special meaning in its context in these enactments? It is, I think, here that the clue to the judgment of Slesser L.J. can be found: and to understand it, it is necessary to cite from section 31 (1) of the Act of 1927 which Slesser L.J. himself quoted: "Subsection (1) of section "21 of the Finance Act, 1922, shall have effect as if at the end "thereof there were added as a new paragraph the following: "'For the purpose of this subsection any such sum as is herein-"'after described shall be regarded as income available for "'distribution among the members of the company and not as "'having been applied or being applicable to the current require-"'ments of the company's business or to such other requirements "'as may be necessary or advisable for the maintenance and "'development of that business. . . .'" There follows a list of certain "applications" which are by the effect of the subsection taken out of the benefit of the proviso to the original subsection and declared, even though they may have been in fact expended, still to be "available for distribution" among the members.

Now Slesser L.J. had observed [15] that under the original subsection [of the Act of 1922] it was the commissioners' duty to arrive at the "notional" figure which ought to have been distributed—that being, as he thought, the limit of liability for taxation—arrived at, in the light of the proviso, by reference to the test of reasonableness. ". . . The words," said Slesser L.J.,[15] "'income available for distribution to the members' "do not occur in the Act of 1922 for the reason, as I think, that "the legislature was then dealing only with that part of the "income which was deemed to be a reasonable part *ascertained* "*as in that section provided.*"

There follows in the judgment the reference to section 31 (1) of the Act of 1927, and the conclusion is stated in the following passage [16]: "That points to a complete and exhaustive antithesis "between the income being available for distribution among

---

[15] [1933] 1 K.B. 488, 503.

[16] Ibid. 504.

" members of the company on the one hand, and money applied " to the requirements of the company's business or requirements " for maintenance and development of the business on the other " hand. If that be a right view, and it is consistent with and " supports the other views which the Master of the Rolls has " expressed, it follows that, when the statute of 1927 speaks of " ' income available for distribution to the members of the company,' it is an express provision that the ascertained income " shall be deemed to be available for distribution, regardless of " whether it is a reasonable part within the meaning of the earlier " Act."

From the passages which I have quoted from the judgment of Slesser L.J., I have for my part come to the conclusion that his acceptance of the conception of the " mandatory " character of a direction in the case of a broken period depended on the view which he took of the meaning of the phrase " income available for " distribution "; and that the latter view in turn depended on his opinion that the phrase was introduced so as to be applicable only in those cases in which the assumed duty of the commissioners to ascertain the " notional " or reasonable amount which ought to have been distributed was excluded.

It is conceded that Slesser L.J. fell into error in supposing that in cases falling under the original Act the commissioners had a duty to ascertain any " reasonable " figure which fixed the limits of tax liability. *Colville Estate Ld.* v. *Inland Revenue Commissioners* [17] was not cited to the Court of Appeal in *Collier's* case.[18] In *Colville's* case [19] it had been clearly held that if in such a case as I am supposing, that is, one falling under the terms of the original Act of 1922, a company had not distributed a reasonable part of its actual income, then the members were liable to be taxed in respect of the whole of that income and not a reasonable part only of it; and that view of the section was later approved in the House of Lords in *Fattorini's* case,[20] *per* Lord Atkin,[21] *per* Lord Macmillan,[22] and *per* Lord Wright.[23]

It was argued that the error into which Slesser L.J. fell was nevertheless not essential to the ratio of his decision of the case. As a matter of strict logic, it may be that the conclusion was independent of the false premise. The question is, however, not whether, as a matter of logic, the conclusion depended on the

[17] [1930] 2 K.B. 393; 15 T.C. 485.
[18] [1933] 1 K.B. 488.
[19] [1930] 2 K.B. 393.
[20] [1942] A.C. 643.
[21] Ibid. 655.
[22] Ibid. 660.
[23] Ibid. 663.

premise, but whether Slesser L.J. thought that his conclusion followed from the antithesis which he had earlier stated; and I am very far from satisfied that, if it had not been for his view of the effect of the original section and of the contrast which he consequently discerned from the introduction of the formula " available for distribution, etc.," he would ever have formed the view which he did of the meaning of that formula. For my part, therefore, I should be prepared to hold that the judgment of Slesser L.J., if it would otherwise be authoritative, can be reviewed in this court (within the principle of *Young* v. *Bristol Aeroplane Co. Ld.*[24]) on the ground that it was delivered, in this essential respect, per incuriam, or that a material part of the reasoning on which the conclusion rests is inconsistent with later pronouncements (in *Fattorini's* case [25]) of the House of Lords.

I return to the judgment of Lord Hanworth M.R. I have already ventured respectfully to make the criticism that the judgment is somewhat obscure and to observe that certainly if the Master of the Rolls did accept the argument for the " automatic " effect of a direction in respect of a " broken period " he nowhere so stated in clear terms. Without multiplying citations I take one passage which seems to come most near to the language of Slesser L.J.[26]: " I have come to the conclusion that, in the " case where there has been a winding-up order or resolution, we " are bound by the direct and simple words of section 31 (4). " In such a case the income of the company is to ' be deemed to " ' be income of that period available for distribution to the " ' members of the company,' and the section explicitly eliminates " in such a case the words ' within a reasonable time.' The effect " of taking out those words is that you get a hard and fast " terminus ad quem, to which regard is to be had. You are not " to allow a period during which there can be a determination " whether the company shall or shall not divide a reasonable part " of its actual income. I think the elasticity originally given by " section 21 (1) in regard to the part of the profits which was " reasonably distributable, has also been eliminated."

I was at one time inclined to think that Lord Hanworth had been disposed to base his conclusion rather upon the view that by December 20, 1928, it had become too late in any event for the company to justify, or determine upon, non-distribution; and if Lord Hanworth's ratio differed from that of Slesser L.J. then the latter would stand alone and would not, I apprehend, be binding on this court. But clearly Slesser L.J. had no doubt of the unanimity on this essential point between himself and Lord Hanworth; and I think that that view must be accepted. But I think also that the disabling quality in the judgment of Slesser L.J. must, as a consequence, equally affect that of Lord Hanworth M.R.

---

[24] [1944] K.B. 718.
[25] [1942] A.C. 643.
[26] [1933] 1 K.B. 488, 500.

There remain two further points. First, a conclusion on this point was not essential to the result of this case. Second, as I have earlier stated, the "mandatory" argument found no place among the Crown's contentions before the board of referees. The case of the Crown[27] was that the company had not distributed a reasonable part of its income for either the last of the company's financial years or for the broken period—not materially distinguishing between the two. In my judgment these circumstances, together with the circumstance that the Crown was not called upon to argue in the Court of Appeal, support the view which I have formed that the judgments of the majority of the Court of Appeal may fairly be regarded as having, in the material respect, been given per incuriam. But my conclusions on these matters do not affect the result of this appeal which, for reasons earlier given, must in my judgment be dismissed.

Jenkins L.J. stated the nature of the appeal, read section 21 (1) of the Finance Act, 1922, and section 31 (4) and (5) of the Finance Act, 1927, and continued: The matter had previously come before Harman J. on November 26, 1952, when, not being satisfied with the finding of the special commissioners in the stated case on the question whether income had been unreasonably withheld from distribution, he remitted it to them for a further finding on that question, with directions as to the principles by which they should be guided in reaching their conclusion. The judgment under appeal thus proceeded upon the case as originally stated, together with the further finding for which the judge had called and which again upheld the direction. Mr. Tucker, on behalf of the appellant company, submits that the special commissioners misdirected themselves on the first occasion and were misdirected by the judge on the second occasion, and that the direction should be discharged.

The appeal to the special commissioners related to a direction in respect of the financial year ended on April 30, 1943, as well as the direction in respect of the broken period from May 1, 1943, to the beginning of the voluntary winding up of the company on December 9, 1943, which is the subject of the present appeal. The special commissioners discharged the former direction, and there has been no appeal by the Crown from that part of their decision. The former direction is, therefore, no longer material, save in so far as the special commissioners' finding to the effect that there was no unreasonable withholding of profits from distribution as regards the year ended on April 30, 1943, can be said to afford an argument in support of the view that a similar conclusion should have been reached as regards the final period.

---

[27] 18 T.C. 83, 90, para. (d).

The history of the company is fully narrated in the case stated from which I extract the following:—" The company was " incorporated as a private company on April 12, 1939, to acquire " the partnership business of builders and contractors previously " carried on by A. & J. Mucklow. The authorized capital of " the company was £100,000. The issued capital was £60,002 " which was taken up equally by the brothers Albert and Jothan " Mucklow, who were the sole directors. No increase was ever " made in the amount of the issued capital. . . . By an agree- " ment dated April 14, 1939 the company purchased the afore- " said partnership business for £93,924, satisfied as to £60,002 " by the issue of shares as aforesaid, the balance of £33,922 " remaining as a loan from the partners. The company repaid " this loan by making successive sums available between July, " 1939, and April, 1941, for meeting tax liabilities of the partners. " Cash amounting to £51,194 net was excluded from the sale and " was retained by the partners. The company continued to trade " from April 14, 1939, until December 9, 1943, when Jothan " Mucklow was appointed liquidator in a voluntary winding-up. " The business was sold by the liquidator on December 23, 1943, " to a new company A. & J. Mucklow & Co. Ld. formed for the " purpose. At no time did the appellant company pay any " dividends."

The case goes on to comment on the company's trading activities and accounts from its incorporation down to December 9, 1943. It appears that when the outbreak of war made it impossible to continue the development of building estates which had at first been the company's main activity, the company turned to the hiring-out of machinery, such as tractors and bulldozers, with highly profitable results. The period to April 30, 1940, showed a loss of £12,394 explained as due to the writing-down of land on which development had to be suspended owing to war conditions. Thereafter profits were consistently made, amounting to £57,002 for the year to April 30, 1941, £55,496 for the year to April 30, 1942, and £44,987 for the year to April 30, 1943.

The case continues:—" It appears from the above trading " results that the balance on profit and loss account had accumu- " lated by April 30, 1943, to £145,092. There was a further " profit in the period up to the date of liquidation, December 8, " 1943, of £14,534, bringing the total accumulation up to " £159,626. These figures were subject to taxation liabilities. " . . . A bank overdraft was incurred by the company during " initial trading period, and appears at £42,667 at April 30, 1940, " £80,232 at April 30, 1941, and £32,650 at April 30, 1942, this " last amount having been cleared by April 30, 1943, by which " date there was a credit cash balance of £14,366. This credit " cash balance had increased to £41,117 by December 8, 1943. " A copy of an ' Analysis of balance sheets ' as at April 30, 1943, " and December 8, 1943, is annexed. . . . This analysis shows " the assets etc., ' Not immediately realizable,' totalling £136,066 " and £127,824 at the respective dates, those ' realizable,' total- " ling £30,266 and £18,035 and those ' liquid,' totalling £40,107 " and £75,117. A footnote states that ' taxation liabilities at " ' December 8, 1943, paid subsequently but not provided for " ' above have amounted to £49,748.' "

After referring to the minutes of a number of meetings of the directors and of the company, the case continues:—" At the " aforesaid directors' meeting of October 18, 1943, it appears " that ' after very careful consideration ' the directors recom- " mended that the total of £145,091 to the credit of profit and " loss account should be carried forward; it was so resolved at " the ordinary general meeting of November 8, 1943. At the " aforesaid directors' meeting of December 4, 1943 it appears " that ' the chairman explained that it was proposed to wind up " ' the company '; a special resolution to that effect, appointing " Jothan Mucklow liquidator, was passed at the extraordinary " general meeting of December 9, 1943. A new company, A. & J. " Mucklow & Co. Ld., hereinafter called ' the new company ' was " incorporated on December 23, 1943. . . . The authorized " capital of the new company was £250,000 and the issued capital " £130,000. As in the case of the appellant company this was " taken up equally by the brothers Mucklow who were the sole " directors. The amount of the issued capital has not been " increased. On the same day as that of the incorporation of " the new company, December 23, 1943, the liquidator of the

C. A.
1954

A. & J. Mucklow Ld. (in liquidation) v. Inland Revenue Commissioners.

Jenkins L.J.

"appellant company sold its business to the new company, the "consideration for the sale being £131,682. . . . The capital assets "of the appellant company at the date of liquidation amounted "to some £220,000 reduced by taxation to about £170,000. Of "this latter sum about £35,000 net was excluded from the sale, "paid by the liquidator to and retained in the hands of the "brothers Mucklow, who put it on deposit to guarantee an over-"draft of the new company."

Evidence was given by both the brothers Mucklow. I extract the following from that of Mr. Jothan Mucklow as set out in the case:—". . . The question of paying a dividend on the last "day of the old company's existence, December 9, 1943, never "occurred to him because there were no accounts, and it never "occurred to him to consider a fresh lot of accounts. Everything "he did was done by rush tactics, the whole purpose of which "was that the company's expenditure policy should not change. "He did not think there was any better reason for paying a "dividend on December 9, 1943, than at the annual meeting "on November 9, 1943, or that there could have been unless "they had been making tremendous profits since the last "accounts. The new company was still the same business, as "far as he was concerned. When the new company was formed, "he and his brother as shareholders of the old company retained "£55,000 cash, but they had to repay to the liquidator £20,000 "to meet the taxation liability of the old company which left "them with about £35,000 but he did not regard that as effec-"tively lessening the capital of the new company. The money "was not retained for their personal use but was put on deposit "for the new company's use. They had not drawn any of it, and "it was still there. It had not been necessary to increase the "issued capital of £130,000 but it would have been necessary, "if they had been able to get going with the building."

The decision of the special commissioners is thus stated in the case:—"27. . . . We had been requested to express our "opinion on the broad question of what was reasonable. Were "it possible to view this question apart from the proviso to "section 21 (1) of the Finance Act, 1922, and section 31 (4) of "the Finance Act, 1927, with the relevant authorities, we should "have formed the opinion that it was not unreasonable for the "appellant company to pay no dividend in respect of the broken "period up to the date of liquidation. But the matter was not "so at large, and we had to determine it by reference first to "section 31 (4) of the 1927 Act, under which the income of the "appellant company for the period in question must be deemed "available for distribution, and secondly, to the proviso to section "21 (1) of the 1922 Act, under which the test of what was "reasonable had to be interpreted by reference to the current "and future requirements of the appellant company's business. "The evidence as to such requirements of the business at "October, 1943, before liquidation was contemplated had much "impressed us, and we had accepted it in discharging the first "direction. But current and future requirements meant nothing "in the case of a company which was being wound up, and the "company's appeal must fail. Moreover, the case was, in our "opinion, clearly covered by *H. Collier & Sons Ld.* v. *Commis-"sioners of Inland Revenue*,[28] by the authority of which we are "bound. We accordingly confirmed the direction."

In his judgment of November 26, 1952, on the case as originally stated, Harman J. considered at some length the question whether (as the Crown submitted and the special commissioners had thought) *Collier's* case [28] in this court was binding authority for the proposition that the words "shall . . . be "deemed to be income of that period available for distribution "to the members of the company" in section 31 (4) of the Act of 1927 have the effect of making the income of a company for the period ending with the commencement of its winding-up automatically liable to a direction under section 21 of the Act of 1922 on the ground that "deemed to be income . . . available for "distribution" means "deemed to be income which there is no "reason not to distribute," or, in other words, income which if not distributed (as it never in fact could be in such a case) is withheld from distribution without reason, and, therefore, unreasonably withheld. Harman J. held that though a majority of this court (Lord Hanworth M.R. and Slesser L.J.) placed this construction on section 31 (4), the case should not be regarded as a binding authority on this point, mainly, I think, on the ground that the view expressed upon it by the majority, which was the opposite of the view taken by Finlay J. below, was not necessary to the decision, inasmuch as the special commissioners had found on the facts that it was unreasonable not to have distributed the income in question, or in other words, that a reasonable part of that income had not been distributed; and the case could, therefore, be disposed of simply by holding, as did Romer L.J., that there was evidence upon which the special commissioners could so find. Harman J. therefore regarded himself as free to decide in accordance with his own views the question whether the language of section 31 (4) imported automatically a notional failure to distribute a reasonable part of the company's income for the final period and consequent liability to direction, and for reasons which seem to me wholly convincing unless *Collier's* case [28] forbids their consideration, he came to the conclusion that it did not.

---

[28] [1933] 1 K.B. 488.

On the question of onus of proof, Harman J. referred to *Fattorini's* case [29] and in particular to this important passage from the speech of Lord Atkin [30]: "It seems clear that the discussion "must proceed ab initio on the footing that the action of the "directors must be judged by considering what their conduct "would reasonably be if no question of surtax influenced their "decision. Withholding of distribution for the purpose of 'avoid-"'ance of the payment of surtax' by shareholders would, if "found, obviously negative the reasonableness of any part so "withheld. The other general point to be observed is that, as it "seems to me, what has to be found is that the company acted "unreasonably in withholding some part of its income from distri-"bution. It is not enough to show that a part could reasonably "be distributed, if at the same time it could be said, as it well "might, that it was equally reasonable to withhold distribution. "The section is highly penal, and I feel no doubt that the onus "is originally and remains on the revenue to show that the "company acted unreasonably in withholding part of its income "from distribution. What is reasonable has consistently been "held to depend upon the actual conditions known at the time for "decision. In the application of this section it is what *these* "directors recommend and *these* shareholders decide in *those* con-"ditions of *that* company. There is no abstract conception of "reasonableness, and the conclusion is not to be reached on a "priori reasoning."

In expressing his conclusion that the case should be remitted to the special commissioners for a further finding Harman J. said:—"I conclude, therefore, that the commissioners mis-"directed themselves in holding that section 31 (4) and "*Collier's* case [31] bound them to hold that the direction was "mandatory and followed automatically in the circumstances. It "may well be that it will usually follow, because it is hard to see "what circumstances can make it reasonable to refrain when the

---

[28] [1933] 1 K.B. 488.

[29] [1942] A.C. 643.

[30] Ibid. 656.

[31] [1933] 1 K.B. 488.

"the company is on the point of expiring, having regard to the "injunction to treat the profit as available for distribution and "considering that the factors mentioned in the proviso to section "21 can have little weight. None the less, in my judgment, "it is the duty of the commissioners to consider the matters as "Finlay J. indicates in *Collier's* case.[31] Have they done this? "I am unable to say. I cannot find from their statement about "reasonableness in paragraph 27 of the case what factors they "have considered in expressing this hypothetical view. They "describe it as a 'broad question,' and it looks as though they "have considered reasonableness as divorced from the circum"stances. There are two limiting considerations imported: first, "that the income must be considered 'available' and so forth, "and, secondly, that the proviso to section 21 indicated two of "the factors to be taken into account. Moreover, I think that "the needs of the new company for financial support must be "irrelevant. With these guides, the commissioners must seat "themselves in the board room and consider the whole situation "facing the directors at the relevant time, remembering Lord "Atkin's warning about onus. Unless they conclude that the "directors have acted unreasonably, they must discharge the "direction. I cannot feel sure that they have gone through this "process, and I must say I feel great sympathy with them, for "it is a hard one. It would be much simpler if the Crown were "right and the result automatic, but I feel constrained to hold "that it is not. Therefore, I must remit the case for a new "finding, hoping, though without much confidence, that what "I have tried to indicate may help them to find a way through "this dark legislative jungle."

In the report of their further finding, submitted in accordance with the directions of the judge, the special commissioners, after some preliminary observations in the course of which they remarked that they bore in mind that in every case the onus was on the Crown to establish that in the circumstances it was unreasonable of the company concerned not to make a distribution, or a larger distribution as the case might be; that the requirements mentioned in the proviso to section 21 could have little or no force in the case of a company going into liquidation; but that the proviso while directing a special attention to those matters did not exclude other circumstances which might bear on the question of reasonableness, continued:—"The appellant company went

---

[31] [1933] 1 K.B. 488.

"into liquidation on December 9, 1943. It did not make any distribution out of the income deemed to be available for the "purpose. In view of the financial situation of the company, "to which reference is made in paragraph 6 below, we have no "difficulty in finding that it could reasonably have made a substantial distribution by way of dividend. But we have to ask "whether, in all the circumstances existing at December 9, 1943, "it was also reasonable to make no distribution, or whether this "was unreasonable. The brothers Mucklow, who were both the "directors and the shareholders of the company, inevitably had in "mind the purposes of the liquidation, which were to facilitate "the expansion of the business through the formation of a new "company. But, so far as the company's income was retained "with that end in view, we cannot find that the brothers, when "they refrained as directors from recommending a distribution, "were actuated by any reason distinct or severable from the "desire to support the financial needs of the new company. Such "support was the form which their concern for the business took. "With the guidance given us by the judgment we cannot regard "such a desire or purpose as any relevant or valid consideration "in the company's favour.

"On the other hand, the brothers as directors had to consider "any commitments of the appellant company existing at December 9, 1943, for which provision was required to be made. There "was in fact one substantial commitment in regard to outstanding "tax liabilities, which were of unascertainable amount. We "recognize that this was a definite and valid consideration, but "we ask ourselves whether, allowing it full weight, we can regard "it as sufficient by itself to make it reasonable for the company "to withhold the whole of the income deemed to be available to it "for distribution. On reviewing all the figures and evidence "before us, particularly having regard to the strong position of "the company on profit and loss account, and to the fact that "liquid resources amounted at December 8, 1943, to some £75,000 "(on both of which matters the Crown relied) we feel bound to "answer the question in the negative.

"After carefully considering the whole of the facts we are "unable to find any circumstances or combination of circumstances making it reasonable for the company to refrain from "making a distribution. We therefore conclude that the company "acted unreasonably in so refraining, and we find that it did not "distribute 'a reasonable part of its actual income' for the "period in question."

After hearing further argument on the special commissioners' report of their further finding, Harman J. in his judgment said that so far as he could tell from their report the special commissioners had faithfully followed the lines which he had indicated (as I think they clearly had), and he held (in effect) that the conclusion adverse to the appellant company expressed in paragraph 7 of their report was a finding of fact reached, without misdirection or the application of any wrong principle, on evidence sufficing to justify it, with which he ought not to interfere, and with which, indeed, he agreed. He, therefore, dismissed the company's appeal, and the present appeal has at long last resulted, coming as it does before this court more than 10 years after the end of the period to which the dispute relates, a delay which, after making every allowance for war-time difficulties in revenue administration, seems to me to be wholly inordinate.

It is not possible to assess the merits of the arguments presented in support of this appeal without forming some view as to the statutory conception of reasonableness underlying the essential condition of liability under section 21 (1), namely, that the company should not have " distributed to its members . . . a " reasonable part of its actual income " for the period in question. These words have to be construed in the light of the proviso to the subsection, which says that " in determining whether a company " has or has not distributed a reasonable part of its income " regard is to be had " not only to the current requirements of the " company's business but also to such other requirements as may " be necessary or advisable for the maintenance and development " of that business." It should be noted, however, that, as recognized by the special commissioners and by Harman J., the matters mentioned in the proviso are merely matters to which regard is to be had, and that it by no means necessarily follows that they are the only matters to be taken into account. The question in each case must be, " Having regard to all the relevant " circumstances, including the matters mentioned in the proviso, " has this company distributed a reasonable part of its income for " the period in question? " and as appears from the passage quoted above from the speech of Lord Atkin in the *Fattorini* case,[32] the question which must be answered affirmatively in order to justify a direction under section 21 is not " Could this company " reasonably have made some distribution or some larger distri- " bution? " but " Was it unreasonable for this company not to

---

[32] [1942] A.C. 643, 656.

"make any distribution, or not to make some larger distribution?" On the other hand, I think it is clear that for the purposes of the section it is to be considered unreasonable not to distribute income when there is no reason, or no sufficient reason, relevant to the needs, present or future, certain or contingent, of the company's business which makes its retention necessary or expedient in the interests of the company's business.

In applying section 21 to liquidation cases, such as the present, a feat of imagination has to be performed, for it has to be assumed that the company could, notwithstanding its winding-up, distribute as dividend (as distinct from return of assets) profits earned during the period from the end of its last complete financial year down to the beginning of the winding up, and (accepting for the moment the rejection by Harman J., notwithstanding *Collier's* case,[33] of the theory of automatic direction) it must further be assumed that it may be unreasonable not to distribute that income or some part of it as dividend notwithstanding that the shareholders will, in and by virtue of the winding up, in any case receive the whole of the surplus of assets over liabilities in the ordinary course of liquidation. It follows that such a company cannot meet a claim under section 31 (4) by saying, "True, no "part of the income for the final period was distributed, but there "was nothing unreasonable in that, for in view of the winding "up it was coming to the shareholders anyhow in the form of "surplus assets." The necessary feat of imagination having been performed, the test by which the reasonableness or unreasonableness of the supposed withholding of the hypothetically possible distribution must be judged is the same as it would be in relation to any other period. It must, however, be borne in mind that the fact of the winding up and consequent cesser of the company's business necessarily eliminates most of the grounds which might in relation to any other period suffice to prevent a withholding from distribution from being unreasonable.

In his argument for the appellant company Mr. Tucker was obviously concerned to support Harman J.'s view that, notwithstanding *Collier's* case,[33] the theory of automatic direction and liability in respect of any income of the final period should be rejected. This was logically his first point, though he properly reserved his observations upon it for his reply, as the judge had decided it in his favour. On the assumption that *Collier's* case[33] and the automatic theory were out of the way, Mr. Tucker

---

[33] [1933] 1 K.B. 488.

C. A.

1954

A. & J. MUCKLOW LD. (IN LIQUIDATION) v. INLAND REVENUE COMMISSIONERS.

Jenkins L.J.

contended that Harman J. had misdirected the special commissioners, who consequently in their further finding had misdirected themselves in treating the needs of the new company in relation to the maintenance and development of the business transferred to it by the old company as irrelevant. He submitted that the winding-up of the old company merely for purposes of reconstruction, and the consequent transfer of the business to the new company merely by way of reconstruction, should be ignored, with the result that the same considerations as led the special commissioners to discharge the direction in respect of the year to April 30, 1943, should have led them to discharge the assessment under appeal. He further contended that the special commissioners and Harman J. had failed to apply the principles regarding the onus of proof stated by Lord Atkin in the *Fattorini* case,[34] and that it followed from a proper application of those principles that the Crown had failed to discharge the burden of proving that the company had unreasonably withheld this income from distribution.

As to the first of these contentions, I agree with Harman J. that the needs of the new company are not for this purpose a relevant consideration. I think that we are bound to hold them irrelevant in view of the observations regarding the effect of such a transfer by Romer L.J., and in the House of Lords by Lord Hailsham (with whom the other Lords concurred), in *Montague Burton Ld.* v. *Inland Revenue Commissioners.*[35] Romer L.J. said[36]: "The company had no business whose requirements had "to be considered; the business had been sold to a new company. "There were no business requirements that the directors could "take into consideration, or that the commissioners would have "to take into consideration." Lord Hailsham said[37]: "There "is also in the present case a point which is very well put, if I "may say so, in the judgment delivered by Romer L.J. in the "Court of Appeal. At the end of the year ended March 31, 1929, "the position was that the company had sold its whole business "to the new company; it required no sums for the maintenance "or development of the business which it had so transferred . . ."

If I am wrong in this, I think that Mr. Tucker's argument fails on the facts. I appreciate that if the needs of the new company could be regarded as relevant it might be said that it was not unreasonable to make no distribution because the whole of the old company's resources had to be transferred to the new

---

[34] [1942] A.C. 643, 656.

[35] (1936) 20 T.C. 48.

[36] Ibid. 73.

[37] Ibid. 77.

C. A.

1954

A. & J. Mucklow Ld. (in liquidation) v. Inland Revenue Commissioners.

Jenkins L.J.

company to enable it to maintain and develop its business. But in this case the whole of the old company's resources were not so transferred. No less than £35,000 excepted from the sale was distributed to the brothers Mucklow in the winding up. It is true that they placed this sum on deposit to guarantee the new company's overdraft; but they could equally well have done that if the £35,000 or some part thereof had come to them as dividend, the fact that it would then have been diminished by surtax being, of course, wholly irrelevant for the present purpose. I fail to see, therefore, how on the facts of this case the needs of the new company, even if proper to be included in the matters to which regard should be had, could provide any ground for holding that it was not unreasonable to withhold from distribution the income of the final period which under section 31 (4) has to be treated as capable of being distributed as dividend.

As to Mr. Tucker's contention regarding the onus of proof, it is, I think, important to bear in mind what has to be proved and the nature of the proof of which it is capable. The thing to be proved is an unreasonable withholding from distribution. But given a withholding, the reasonableness or unreasonableness of it is not susceptible of direct proof short of, so to speak, a plea of guilty by the company. It is an inference of fact to be made from the primary facts, comprising the nature of the company's business, its financial position, the needs of its business, present or future, certain or contingent, the amount of the income in question, the extent, if any, to which it has been distributed, and any reasons deducible from the foregoing facts or otherwise shown for not distributing it or, as the case may be, not distributing more of it. If, on consideration of the whole of the facts as proved or admitted in the course of the hearing, the special commissioners find that there was income which could have been but was not distributed, and that on the facts as proved or admitted there was no reason, or no sufficient reason, for not distributing it, then they can and ought to conclude that the company has acted unreasonably in withholding it from distribution. The onus is on the Crown in the sense that the direction must be discharged unless the facts proved or admitted are such as to justify that conclusion. I do not think that Lord Atkin's observations in the *Fattorini* case [38] should be taken as meaning anything more than this.

As to *Collier's* case,[39] I confess to feeling considerable difficulty. In that case a company sold its business to a new company for shares, and went into liquidation on December 20, 1928. Its financial year ran from September 1 to August 31. The sale was effected under a sale agreement dated November 16, 1928, which provided that the profits as from September 1, 1928, should be included in the sale. A direction was made on the company under section 21 and section 31 (4) for the period from September 1 to December 20, 1928. The case came before Finlay J. and the theory of automatic direction and liability which I assume to have been contended for on behalf of the Crown, although there is no report of the argument, was considered and rejected by him. The main contest was on the question whether, if the direction was otherwise warranted, the income from September 1, 1928, to November 15, 1928, could properly be included in the direction in view of the fact that it had been retrospectively sold to the new company. The Crown admitted that the claim in respect of income for the period subsequent to the date of the sale agreement could not be supported since this had never been income of the company. Finlay J. held that the sale did not affect the position with regard to the profits for the period from September 1, 1928, to November 15, 1928, and dismissed the company's appeal on the ground that the facts warranted the finding that there had been an unreasonable withholding of income from distribution. The company appealed to this court, and in the course of Mr. Roland Burrows' argument in support of the appeal, Slesser L.J. raised against him the point as to the automatic effect of section 31 (4) on which Finlay J. had decided in the company's favour. The company was thus, in effect, called upon to justify a decision in its favour which, according to the usual practice, should have been accepted until attacked by the Crown. In these circumstances Mr. Roland Burrows did argue the point, though it may well be less fully and effectively than he would have been able to do in reply if the more usual course had been taken. In the result, the Crown was not called upon to argue, and as appears from what I have said earlier in this judgment, Lord Hanworth M.R. and Slesser L.J. both gave judgments against the company in which they clearly, as I think, adopted the " automatic " construction of section 31 (4), while Romer L.J. confined himself to dismissing the appeal on the facts, though in language which certainly suggests that he did not agree with the construction placed by the other members of the court on section 31 (4), as to which, however, he expressed no opinion. It has been pointed out that Slesser L.J. seems to have been under the impression that the surtax liability attracted by a direction under section 21 was confined to the income which might reasonably have been distributed, instead of extending, as it undoubtedly does, to the whole of the income of which a reasonable part has not been distributed. It is said that the misapprehension may have affected his view by giving rise to a false antithesis between income which could have been distributed (or, in other words, "available for distribution") on the one hand, and income required by the company for purposes such as those mentioned in the proviso to section 21 (1) and which, therefore, could not reasonably have been distributed (or, in other words, income not "available for distribution") on the other hand, which led him in effect to conclude that income deemed to be available for distribution is deemed to be income which would reasonably have been distributed, whether it is in fact such or not. I feel the force of this criticism, but it does not alter the fact that Slesser L.J. did quite clearly express his concurrence with Lord Hanworth M.R. There is, however, the further point noted by Harman J. that, having regard to the conclusion reached by the board of referees on the facts, the views of the majority of the court as to the automatic effect of section 31 (4) were not necessary to the decision.

---

[38] [1942] A.C. 643, 656.

[39] [1933] 1 K.B. 488.

For the reasons I have stated, I cannot regard the circumstances in which the majority judgments in *Collier's* case [39] were delivered as wholly satisfactory, and having regard to those circumstances, to the probability that the court was consequently denied the assistance of anything comparable to the very full argument addressed to us in the present case, and to the fact that it was unnecessary for the purpose of deciding the case then before the court to express any opinion on this aspect of the construction of section 31 (4), I think that those are substantial grounds for the view that we would be justified in holding that it should not be considered as a binding authority for the proposition that section 31 (4) is automatic in its effect.

If so justified, I would have little hesitation in adopting the conclusion reached by Harman J. The phrase "available for "distribution" means in itself no more than "capable of being "distributed," and I would require a very strong context to convince me that in a taxing Act, and to the detriment of the taxpayer, it should be construed as equivalent to "which ought in "reason to be distributed." I admit that some colour is lent to this view by the addition made by section 31 of the Act of 1927 to the proviso to section 21 of the Act of 1922, as the addition provides that the various sums therein mentioned "shall be "regarded as income available for distribution . . . and not as "having been applied or being applicable to the current require"ments of the company's business or to such other requirements "as may be necessary or desirable for the maintenance and "development of that business." But even here, having regard to the primary meaning of "available for distribution" I think it is possible to hold that recognition of other grounds for considering the withholding of the income in question not to be unreasonable is not excluded. In section 31 (4) itself the words "deemed to be . . . available for distribution" are clearly appropriate in their primary meaning of "capable of being "distributed." Mr. Tucker referred us to the regulations contained in the First Schedule to the Finance Act, 1922, and to the amendments of those regulations contained in section 31 (7) of the Act of 1927, and observed with force that there was nothing in those amendments to make the regulations in the least appropriate to the automatic liability alleged to have been introduced by subsection (4) of the very same section. Again, as Mr. Tucker pointed out, section 18 of the Act of 1928, which amends the procedure in section 21 of the Act of 1922, contains nothing appropriate to automatic liability. He also referred us to section 14 of the Act of 1937, where "available for distribution" clearly has its primary meaning of "capable of being distributed." By contrast he referred us to section 14 of the Finance Act. 1939, for the very different language used by the legislature for the purpose of providing for automatic liability as regards investment companies.

---

[39] [1933] 1 K.B. 488.

These reasons suffice to satisfy me that, apart from *Collier's* case,[39] it would be right to hold that section 31 (4) of the Act of 1927 does not impose automatic liability, but leaves open the question whether there was any unreasonable withholding of income from distribution on the hypothesis that the income concerned was "available for distribution," that is to say, "capable of "being distributed" as income, notwithstanding the winding up.

So far as the present case is concerned, I am content to assume, without deciding, that *Collier's* case [39] is not binding, and that I am free to follow my own opinion to the effect indicated above. I say this because my assumption that I am free to do so cannot, in my judgment, alter the result, for I think that quite

[39] [1933] 1 K.B. 488.

apart from the decision in *Collier's* case,[39] the special commissioners' conclusion here was well warranted by the facts. I see no reason whatever for disturbing their conclusion, with which I entirely agree, and I hold, accordingly, that this appeal fails and should be dismissed.

HODSON L.J. For the reasons which have been given in the judgments already delivered I am of opinion that the special commissioners were not misdirected, nor did they misdirect themselves, in arriving at the conclusion of fact in favour of the Crown that they were unable to find any circumstances or combination of circumstances making it reasonable for the company to refrain from making a distribution. Their conclusion, therefore, that it acted unreasonably in so refraining, and that it did not distribute a reasonable part of its actual income for the period in question, namely, the broken period from April 30, 1943, the end of the company's financial year, to December 9, 1943, the date of the voluntary winding up of the company, cannot be disturbed.

This court is thus in the same position as the court found itself in in *Collier's* case,[39] in that it is unnecessary to decide the point now taken on behalf of the Crown, but not so clearly taken in *Collier's* case,[39] that the direction in respect of the broken period should have been automatic having regard to the terms of section 31 (4) of the Finance Act, 1927.

I have come to the conclusion that two of the three members of the court, namely, Lord Hanworth M.R. and Slesser L.J., did base their decision on the automatic effect of the last section, and regarded as unnecessary any finding of fact whether or not the company had distributed a reasonable part of its income. Slesser L.J. admittedly misapprehended the penal effect of section 21 of the Finance Act, 1922, which has been recognized as having such effect by the House of Lords in *Fattorini's* case.[40] This misapprehension would be expected to have affected his conclusion as to the automatic effect of the later section, and, if this is so, his opinion on the construction of the section in so far as it was based on a ground held by the House of Lords in *Fattorini's* case [40] to be wrong would enable this court to express its own view, in accordance with the principles laid down in *Young* v. *Bristol Aeroplane Co. Ld.*[41]

The point now having been fully argued on both sides, I am of

---

[39] [1933] 1 K.B. 488.

[40] [1942] A.C. 643.

[41] [1944] K.B. 718.

C. A.
1954

A. & J. MUCKLOW LD. (IN LIQUIDATION) v. INLAND REVENUE COMMISSIONERS.

opinion for the reasons already given that the effect of section 31 (4) of the Finance Act, 1927, having regard to its context, is not automatic, but that it is open to a company in liquidation, if it can, to resist a direction on the facts and to insist on the Crown proving its case in accordance with the directions given in *Fattorini's* case.[42] To put the matter shortly, I think that the words "available for distribution" bear their ordinary meaning and are not equivalent to "which ought to be distributed."

Appeal dismissed.

Solicitors: *Scott & Son; Solicitor of Inland Revenue.*

E. D.

---

[42] [1942] A.C. 648.

1954
Mar. 16.

Harman J.

In re SHERMAN, DECD.
In re WALTERS, DECD.
TREVENEN AND ANOTHER *v.* PEARCE AND OTHERS.

[1953 S. 5347.]

Will—Specific devise—Voidable interest—Devise of property comprised in estate of which testatrix trustee and purchased by her through nominee—Property recoverable by beneficiaries on paying amount of price paid by testatrix—Whether payable to specific devisee or to estate of testatrix.

Trust and Trustee—Breach of trust—Trust property purchased by trustee.

A testatrix by her will specifically devised the freehold house in which she lived and of which she believed herself to be absolute owner. Some years previously she had purported, by transactions which included a conveyance to a nominee and a trust deed supplemental thereto executed by him in her favour, to buy it from herself as sole executrix of the estate of the former owner. On her death her executors, who were also executors by representation of the owner, did not oppose a claim by the beneficiaries under the owner's will to set aside the conveyance to the nominee. Those beneficiaries, however, could regain possession of the property only by paying the money which the testatrix had paid for it with interest from the date on which she paid it: and her executors took out a summons to determine, inter alia, the devolution of that money and interest:—

Held, in deciding that sums due to the testatrix's estate after her death out of the proceeds of the sale devolved under the specific devise and that those so due before her death formed part of her personal estate:

(1) that the testatrix at her death had in the property an equitable interest which was "clearly devisable" within the meaning of those words in *Stump* v. *Gaby* (1852) 2 De G.M. & G. 623;

(2) that the specific devisee, although he would never acquire the property because the beneficiaries under the owner's will had exercised their right to have the conveyance to the nominee set aside, was nevertheless entitled to the money which had been paid for it;

(3) that he was entitled also to the interest on that money from the date of the testatrix's death, the interest on it before that date falling into her personal estate;

(4) that any occupation rent payable by the testatrix during her lifetime must come out of her personal estate, but that any payable since her death must be paid by the devisee or set off against his claim.

Observations in Theobald on Wills, 11th ed., at p. 244, on the rule in *Lawes* v. *Bennett* (1785) 1 Cox Eq.Cas. 167 considered.

ADJOURNED SUMMONS.

By her will dated April 5, 1923, Ellen Jane Sherman (hereinafter called "Mrs. Sherman") appointed her husband executor and trustee and, after giving pecuniary legacies, gave her residuary estate to her husband for life and after his death to be divided equally between specified beneficiaries. In 1928 she died seised in fee simple free from incumbrances of a dwelling-house called "Hyland." In 1935 her husband died, having appointed Rose Alethea Sherman (afterwards Mrs. Rose Alethea Walters and hereinafter called "the testatrix") his sole executrix. He had not executed any assent in writing or conveyance with regard to "Hyland," which thus vested in the testatrix as Mrs. Sherman's executrix by representation. By a conveyance and assignment dated November 16, 1935, the testatrix conveyed the legal estate in "Hyland" to John Sibly, purporting so to do pursuant to a sale by her, as Mrs. Sherman's executrix, of "Hyland" to Sibly for £400. The actual sale was made at an auction of "Hyland" at which Sibly was the highest bidder, making the bid on the testatrix's behalf. By a trust deed dated November 27, 1935, under Sibly's hand and seal and expressed to be supplemental to the conveyance of November 16, it was recited that the purchase price of £400 expressed in the conveyance to be paid by Sibly was paid by the testatrix, that "Hyland" was conveyed to him as trustee for her: and he declared that he so held it as trustee for her beneficially in fee simple. Thus, the conveyance was executed pursuant to a sale by the testatrix, as personal representative, to herself.

By her will dated March 10, 1942, the testatrix appointed her husband and the plaintiffs on this summons executors and trustees thereof and provided: "3. I devise my dwelling-house "and property known as 'Hyland' aforesaid unto my said "husband for his life . . . and from and after the death of my "said husband I devise the said dwelling-house and property "to my aunt Sophie Boston for life. . . . 4. From and after "the death of the said Sophie Boston I devise the said dwelling-"house and property to Frank Boston son of the said Sophie "Boston absolutely." She gave her residuary estate to her husband for life and after his death to a named brother for life, and after that brother's death to specified residuary beneficiaries. In 1949 the testatrix died predeceased by Sophie Boston and the named brother, and in 1952 her husband died.

The testatrix was the last surviving trustee of the trusts of Mrs. Sherman's will: and her executors (who were also executors by representation of Mrs. Sherman) desired the court's direction as to the trusts on which "Hyland" ought to be held and the manner of accounting for the proceeds of sale. There was evidence that Frank Boston, to whom the testatrix had left "Hyland" absolutely after Sophie Boston's death, had refused to have anything to do with the matter, and by this summons, issued on December 1, 1953, the plaintiffs, as the testatrix's surviving executors, asked, inter alia, whether any sums due to the testatrix's estate out of the proceeds of sale of "Hyland" devolved under her will under the provisions relating to "Hyland" in clauses 3 and 4 thereof, or formed part of her residuary estate.

Michael J. Albery for the plaintiffs. The point arising here is not covered by any decided case. True though it may be that the testatrix never had the legal estate, that does not matter, because the declaration by Sibly expressly provided that he held it as trustee for her beneficially in fee simple. The present case is rather like a case of ademption. On the question of conversion, it is clear that really the doctrine applies only where the event causing the ademption takes place after the date of the will: see Theobald on Wills, 11th ed., pp. 159–60.

Maurice Berkeley for the residuary legatees of Mrs. Sherman.

A. C. Sparrow for the residuary legatees of the testatrix. It is conceded that the testatrix, when she made her will, intended to pass to Frank Boston whatever estate she had in "Hyland": *In re Calow.*[1] She was, however, never "entitled" to it in any ordinary sense of that word. She never had the legal estate in it but only a vague equity. In those circumstances she could not have left it to Frank Boston. Even assuming that she could have done so, and that the gift stands, it is a gift of the house in specie and cannot be otherwise interpreted.

In *Lawes* v. *Bennett*[2] land included in a general devise was subject to a lease with a power to the lessee to buy the land. The lessee exercised the option after the testator's death, and it was held that the land was converted as from the date when the power was exercised, and that the proceeds of sale fell into the testator's personal residue. Even though the present case is not one of a general devise, but is concerned only with the specific gift of "Hyland," on the facts of the present case the rule in *Lawes* v. *Bennett*[2] should be followed here and this sum of £400 be treated as forming part of the testatrix's residuary estate.

In *Stump* v. *Gaby*[3] the court held that, assuming that the conveyance was voidable, the person who had executed it had, after its execution "an equitable estate which was clearly devisable." Even if, in the present case, the testatrix had, in "Hyland," an equitable estate which was "clearly devisable," the fact that the conveyance was voidable and that she gave the house in specie to Frank Boston prevents him from getting the £400.

The specific devisee of "Hyland" did not appear.

HARMAN J. On this troublesome point I should have liked to reserve my judgment, but the amount involved is small and it will be right to state my conclusion forthwith.

The testatrix, Rose Alethea Walters, was living at her death in a house, "Hyland," of which she undoubtedly believed herself to be the absolute and indefeasible owner in fee simple. In fact, however, she had in 1935 acquired it in circumstances which made her estate in it voidable. She was the personal representative by representation of Mrs. Sherman and bought this property by the very simple-minded device of putting up a nominee to bid for it and having it conveyed into his name. He clearly acquired a good estate in the property quoad the vendor, but within a few days executed a declaration of trust stating that the purchase money was found by the testatrix and that the property was conveyed to him as trustee for her, and he declared that he held it in trust for her beneficially in fee simple and would at her cost convey the property as she might direct.

---

[1] [1928] Ch. 710.

[2] (1785) 1 Cox Eq.Cas. 167.

[3] (1852) 2 De G.M. & G. 623.

By her will made some seven years later, in 1942, she described herself as of "Hyland," Redruth, and devised the property specifically in these words: "I devise my dwelling-house and "property known as Hyland aforesaid unto my said husband for "his life . . . and after the death of my said husband I devise "the said dwelling-house and property to my aunt Sophie Boston "for her life she keeping the same in repair and insured against "loss or damage by fire. . . ." Then she proceeded: "From and "after the death of the said Sophie Boston I devise the said "dwelling-house and property to Frank Boston son of the said "Sophie Boston absolutely"—Frank Boston being the second defendant to this summons.

In 1954 the beneficiaries under Mrs. Sherman's will have asserted their right to set aside the conveyance to Sibly as trustee for the testratrix on the ground that such a purchase was contrary to the policy of the law, and it is admitted that there is no answer to that claim. The beneficiaries, however, can regain the property only by paying the £400 which the testatrix paid for it, with interest at 4 per cent. from the date of payment. Against that must be set the rents and profits or occupation rent for the property during the time of her ownership.

I am asked whether, in those circumstances, the right to this £400 passes to the specific devisee or goes into residue. There appears to be no direct authority on this subject. It was first suggested to me that this was similar to a case of ademption, where a man, having bought property, subsequently contracts to sell it and then, though the purchase be uncompleted till after his death, the subject-matter of the contract in the ordinary way passes as personalty and not under a specific devise. If the will be made after the date of the contract in circumstances in which it is clear that the testator had the contract in mind in making his will, the contrary view may be taken, but that seems to me to be a matter of construing the will in the light of the circumstances known to the testator when he made it. Perhaps that is exemplified by *In re Calow.*[1] In my view the cases concerning ademption cannot have any bearing on the present case.

---

[1] [1928] Ch. 710.

Cases concerning options seem to me much more nearly in point. The general doctrine is stated in Theobald on Wills, 11th ed. (1954), at p. 244; it is known as the rule in *Lawes* v. *Bennett.*[2] The editor writes: "The doctrine of conversion by "a contract of sale has been extended to the cases where there "is an option of purchase which is afterwards exercised. Thus "where land included in a general devise is subject to a lease "with a power for the lessee to buy the land and the option "of purchase is exercised by the lessee after the testator's "death, the land is converted as from the date when the option "is exercised and the proceeds of sale fall into the personal "residue." It will be observed that that applies to general devises. I can quite understand that, where there is a general devise of chattels real one way and chattels personal the other way, and there is an option on the leaseholds or freeholds exercisable but not exercised till after the death, the court must wait to see whether the option be exercised before deciding into which devise or bequest the subject-matter falls. The paragraph ends, however, with the words: "Somewhat different considerations "apply to cases of specific gifts."

In this case, what had the testatrix when she died? As it seems to me, she had an equitable estate or interest in this property. True it is that equitable estate or interest was liable to be upset, as was the legal estate of Sibly, the nominee, but she had a good equitable interest and that would pass to her devisee perfectly soundly, provided that the beneficiaries did not, as they might not, take steps to set the transaction aside. They were not bound to do it—they might confirm it. Also, they might lose their rights by acquiescence. I quite see that, if there were a general devise here, the principle might apply that the court must wait and see whether they do exercise their right; but I do not think that that applies to a specific devise of this nature. I derive some assistance from *Stump* v. *Gaby,*[3] where the circumstances were not the same, but Lord St. Leonards was dealing with a voidable conveyance and he said: "Assuming that "the conveyance was voidable, the interest which remained in A "after the execution was not a right of entry under the old law "but an equitable estate which was clearly devisable."

In my judgment, this testatrix had an equitable estate which was "clearly devisable," and I think that when she devised "my "property Hyland" she meant to devise whatever interest she

---

[2] 1 Cox Eq.Cas. 167.

[3] 2 De G.M. & G. 623.

1954

SHERMAN, DECD., *In re.* WALTERS, DECD., *In re.*

Harman J.

had in this property to her specific devisee. She had no reason to suppose that he would not get whatever she could give in the property. True it is, now that this right is proved to be voidable, that he will never get the property, but it seems to me that he nevertheless should get the £400 which, so to speak, is compensation for the property. In my judgment, he should also get the interest on that sum of money from the date when the testatrix died. The interest before that date falls into her personal estate. On the other hand, so far as an occupation rent is payable, a similar apportionment will have to be made, and any occupation rent payable by the testatrix in her lifetime must come out of her personal estate. That payable since her death must be paid by the devisee or set off against his claim for interest on the £400.

Therefore, I answer this question by saying that the sums due to the estate of the testatrix out of the proceeds of sale of "Hyland," so far as those sums arise after the date of her death, devolve under the specific devise contained in her will, and that any sum payable to her estate in respect of the period down to her death forms part of her personal estate.

Declaration accordingly.

Solicitors: *Robbins, Olivey & Lake for Grylls & Paige, Redruth.*

K. R. A. H.

WALLBRIDGE AND ANOTHER *v.* DORSET COUNTY COUNCIL.

1954
Apr. 5, 6, 7, 8, 9, 13.

Lloyd-Jacob J.

[1951 W. 4304.]

Children and Young Persons—Foster-children—Meaning—Residential school—Fees paid by parents or local authorities—Parental control not relinquished—Not "living apart" from parents—Not "foster-"children"—"Nursing and maintenance"—"Nursing" not confined to sick nursing—Public Health Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 49), *s.* 206 (1), (3).

Section 206 of the Public Health Act, 1936, provides: "(1) A "person who undertakes for reward the nursing and maintenance "of a child . . . apart from his parents, or having no parents, shall

1954

Wallbridge
v.
Dorset
County
Council.

"give notice thereof to the welfare authority . . . (3) . . . a child ". . . in respect of whom a notice has been or ought to have been "given . . . and who is still living apart from his parents, if any, "with the person by whom the notice was, or ought to have been, "given, is referred to as a 'foster child.'"

The plaintiffs, a husband and wife, carried on a residential school for backward or maladjusted children, in which there were 102 pupils for whom fees were paid, 23 being paid for by or on behalf of their parents, and 79 by local authorities. One child of the latter class was the subject of a probation order, nine were in the care of the local authority under the Children Act, 1948, Part I, and one was the subject of a "fit person" order under the Children and Young Persons Act, 1933, s. 62 (1).

The children, other than the nine "in care" and the one entrusted to the local authority as a "fit person," had parents and homes to which they returned during the holidays, save in a few instances when parents made special arrangements. A parent could visit the school at any time, and could remove his child if dissatisfied. The other ten children were visited from time to time by the children's officer of the defendant authority, acting on behalf of the local authorities responsible for their care.

The defendants contended that the children for whom fees were received were foster-children within the meaning of section 206 (3) of the Public Health Act, 1936:—

Held, (1) that no distinction could be drawn between the children whose fees were paid by their parents, and the children whose fees were paid by local authorities, as in so doing the local authorities were acting as the alter ego of the parent.

(2) That the children were not "living apart" from their parents, as parental control had not been relinquished, and the children were not, therefore, foster-children within the meaning of section 206 (3).

Per curiam: "Nursing" in section 206 (1) is not limited to sick nursing, although it includes it, and means doing whatever is necessary to make the maintenance effective.

ACTION AND COUNTERCLAIM.

The plaintiffs, the Reverend Percy Edward Wallbridge, and his wife, Mrs. Vera Wallbridge, claimed relief against the Dorset County Council in respect of actions taken by officers of the county council in December, 1951, in relation to the plaintiffs' school, a residential school for backward and maladjusted children carried on by the plaintiffs jointly at South Lychett Manor, near Poole, under the name of the Farney Close School. The county council by their defence asserted that they had acted in the course of their public duty, and counterclaimed for a declaration that certain of the children received by the plaintiffs at the school were "foster-children" within the meaning of Part VII of the Public Health Act, 1936.[1]

During the course of the hearing it appeared that allegations of improper treatment of such children, which the plaintiffs believed the defendant council to be asserting, might not be justified and that the allegations of bad faith on the part of certain county council officials, which the defendants believed the plaintiffs to be asserting, might not be persisted in. The parties in consequence agreed terms for settlement of the action, which were approved by the court, and legal argument was heard on the counterclaim.

J. T. Molony and *C. Michael Hughes* for the plaintiffs. The plaintiffs' case is that the children at Farney Close School are not "foster-children" within the meaning of Part VII of the Public Health Act, 1936, which relates to "Child Life Protection." They are not receiving "nursing and maintenance," nor are they "living apart" from their parents within the meaning of section 206 of the Act. To understand the meaning of section 206 it is necessary to examine the history of the legislation from which the provisions relating to child life protection are derived. The earliest statutes concerned are the Infant Life Protection Acts of 1872 and 1897. In section 2 of the Act of 1872, the expression used is "nursing or maintaining," and its application is limited to a child of one year. In section 2 of the later Act the expression remains "nursing or maintaining," but the age is raised to five years. By the Children Act, 1908, the age is raised to seven years, and the phrase used is "nursing and maintenance." Sections 3 and 5 of that Act anticipate the current provisions as to the removal of children from unsuitable premises. The Children and Young Persons Act, 1932, is a consolidating Act, and boarding-schools are no longer specifically mentioned in the exempting provisions relating to child life protection. The expression remains "nursing and maintenance," and the age limit is raised to nine years. The Children and Young Persons Act, 1933, also a consolidating Act, contains in Part III provisions for committing children in need of care or protection to the care of a "fit "person"; by section 76 (as amended by section 5 (1) of the Children Act, 1948), a local authority is included as a "fit "person"; such a person having by section 75 (4) all parental rights and liabilities while the order is in force. The duty of local authorities to assume care of a child who has been abandoned or has no parent or guardian are extended further by the Children Act, 1948, Part I.

---

[1] Public Health Act, 1936, s. 206: "(1) A person who undertakes for "reward the nursing and mainten-"ance of a child . . . apart from his "parents, or having no parents, shall "give notice thereof to the welfare "authority. . . . For the purposes of "this subsection, an undertaking shall "be deemed to be an undertaking for "reward if there is any payment or "gift of money or money's worth, or "any promise to pay or give money "or money's worth, irrespective of "whether there is any intention of "making profit. . . . (3) In the fol-"lowing provisions of this Part of "this Act a child . . . in respect of "whom a notice has been or ought to "have been given under this section, "or under subsection (2) of the next "succeeding section, or under section 1 "of the Children Act, 1908, and who "is still living apart from his parents, "if any, with the person by whom the "notice was, or ought to have been, "given, is referred to as a 'foster "'child.'"

By the Public Health Act, 1936 (the material Act in the present case), the age of a child protected under Part VII was nine years; section 36 of the Children Act, 1948, further extended the age up to 18 years; the expression "nursing and mainten-"ance" remains unchanged. Section 206 of the Act of 1936 is the nearest approach to a definition of "foster-child." It means a child "living apart" from his parents, but a child at a boarding school is not living apart from his parents. The 23 children at Farney Close School, whose parents paid their fees, were there in the ordinary circumstances of children at boarding school; they were merely absent from their homes for the purpose of their education, but (with certain exceptions where special arrangements had been made) they went home to their parents in the holidays, and their parents bought their clothes and paid for their education at Farney Close in the normal way. Their temporary absence from home did not mean that they were "apart" from their parents within the meaning of section 206. If it could be said of them that they were "apart" from their parents, all children at boarding schools would be "foster-children," and subject to the provisions of this Part of the Public Health Act, 1936.

The fees of the remaining 79 fee paying pupils were paid for by local authorities, nine of those being in the care of the local authorities under Part I of the Children Act, 1948, and one child being the subject of a "fit person" order under section 62 (1) of the Children and Young Persons Act, 1933. The local authorities had the same right and duties as parents over them, and were the persons ultimately responsible for the children's welfare. The supervision of the children during term-time would be carried out by the defendants' children's officer.

The children were not maintained by the plaintiffs at Farney

Close; maintenance means the discharge of obligations in respect of children by the persons ultimately responsible for them, either the parents or the local authorities who paid their fees. The school boarded and taught the children, but maintenance includes clothes, which were not provided by the school, any extra clothes bought at school being paid for by the parents or local authorities. It is difficult to understand what is meant by "nursing" when the age is extended up to 18. It cannot mean the sort of care provided by a mother or a nurse of a very young child, and in the case of children not infants it must therefore mean looking after them when they are ill.

"Relatives" in section 220 (the interpretation section of Part VII of the Public Health Act) does not include parents; hence the provision in Part VII relating to the restoration of a child to its relatives did not envisage children who had parents ready to receive them. These children were not apart from their parents and could at any time if necessary be returned to their parents, as in fact they were. The same applies to the children maintained by local authorities, who are in loco parentis. [Reference was made to the Adoption Acts, 1949 and 1950, sections 13 and 45 respectively.]

The exemption in section 219 as to institutions and hospitals is an exemption of premises which provide the sort of facilities defined in section 8 (2) (*b*) of the Education Act, 1944. The exemptions in section 8 of the Nurseries and Childminders Regulation Act, 1948, also relate to premises, in that case premises providing facilities for children too young to be taught, but these provisions have no application to Farney Close where the overriding purpose is the children's education. Since 1948 local authorities have had power to take children "in care" where they are deprived of parental care, and the scope of the Public Health Act will accordingly be narrowed.

Charles Russell Q.C. and *E. S. Fay* for the defendants. The court must not be misled by the label or tag "foster-child"; it must look at what was given that name, and it is necessary to remember the historical point of view. In the Infant Life Protection Act, 1872, the age of the child was limited to one year; that covered the case where persons received a child in their premises, looked after it and fed it, and were paid for so doing. It is obvious that "nursing" was the appropriate word there. But the fact that the age has been increased by successive Acts is no justification for saying that "nursing" means only sick nursing. The expression "nursing" is derived from the old expression, placed out to nurse, and it means care for the well-being of an infant as opposed to expenditure on necessaries for it, and there is nothing in any of the Acts to suggest that it should be confined to sick nursing.

Maintenance means spending money on necessaries for a child, but it cannot be said that maintenance in the provisions relating to child life protection means to the exclusion of maintenance by anyone else; and children are maintained at a boarding school while they are there even if they are also maintained by their parents in the holidays. In the Public Health Act, 1936, the child life protection provisions apply to children up to 18; and maintenance must mean therefore necessities for the child appropriate to its age.

The plaintiffs' argument that because the definition of relatives in section 220 of the Public Health Act does not include parents, the Act only applies to children who cannot be returned to their parents is a false construction of the Act; this can be seen by examination of the earlier Acts. For the purpose of the phrase "restored to its relatives" section 15 of the Infant Life Protection Act, 1897, defines "relatives" to include parents. That Act was repealed by the Children Act, 1908, which contains no general definition of relatives, although section 11 contains a definition of relatives for the purpose of the section exempting persons from the provisions relating to nursing and maintenance of an infant. Parents were dropped from that definition, but it was unnecessary to include them in that exempting provision as they did not need an exemption, although they were not thereby excluded.

In the Children and Young Persons Act, 1932 (which is an Act amending the Act of 1908), the definition in section 11 of the Act of 1908 was left unrepealed. In the Public Health Act, 1936, however, the definition of relatives, although not altered in form, was given a wider application than it had had before, and applied where a child was removed to a place of safety until it could be restored to its relatives; and the plaintiffs have argued that as the definition did not include parents it could not apply to the children at Farney Close because they were not (in many cases at any rate) children who could not be restored to their parents. It cannot be said that this rearrangement of the sections was intended to effect an alteration in the whole law relating to child life protection, and in the Public Health (London) Act, 1936, in which the provisions relating to child life protection are substantially the same, the definition retains its narrow application, and it may have been a slip in the drafting of the principal Act that the definition was put in its present position.

The words "living apart" from his parents mean not living under the same roof as his parents, and a child at a boarding school would be in that position. In section 11 of the Act of 1908 boarding schools were exempted from the operation of the Act, but they are not expressly excluded by the Acts of 1932 or 1936. The defendants contend that all boarding schools are included by the Act of 1936, and that it is plainly envisaged by the statute that boarding schools can include "nursing and maintenance." The Act has to provide for cases where parents pay to have their children looked after, and to receive "nursing and maintenance." Farney Close is that type of case, and is therefore within the Act.

E. S. Fay following. The relevance of the Nurseries and Childminders Regulation Act, 1948, is that it provides a clue as to what Parliament thought had already been provided for child life protection. There are elaborate provisions to avoid dual control, and if the provisions relating to visiting in Part VII of the Public Health Act already apply to a case, it will not come within the provisions relating to visiting in the Act of 1948. It is not the shortness of the period of residence in that Act which matters, but whether a child is being nursed and maintained apart from its parents, the point of the Act of 1948 being to fill a gap. The general intention is that persons who receive other people's children for reward should be subject to supervision, and the wide definition of "foster-children" contended for by the defendants is thus what Parliament intended.

Molony in reply. The various Acts have had different underlying conceptions. The early Infant Life Protection Acts were meant to counteract the specific evils of the times when they were passed. To bring section 206 of the Public Health Act into play, there must be an undertaking of maintenance and nursing for reward. The school here may receive a reward, but it does not undertake maintenance and nursing, whatever that phrase may mean. What is primarily given in this establishment is education. It may be said that as these Acts have been extended, the meaning has altered. The word "maintenance" has a perfectly well understood meaning, namely, the provision of food, board and clothes, and "maintenance" in the Act applies only to a person providing all these things. Acts of a type which interfere with private rights should not be given the widest possible meaning, but should be strictly construed. "Apart from his parents" must mean living apart from his parents the whole time, and only in that event is a child a foster-child.

Cur. adv. vult.

April 13. LLOYD-JACOB J., reading his judgment after stating the issues: The Public Health Act, 1936, contains in sections 206 to 220 inclusive of Part VII certain provisions as to child life protection which are intended to safeguard the welfare of young people up to (at present) the age of 18. This Act, as its long title indicates, consolidated with amendments previous enactments relating to public health; and the child life protection provisions derive from the following Acts: Infant Life Protection Act, 1872; Infant Life Protection Act, 1897; Children Act, 1908, and the Children and Young Persons Act, 1932. My attention has been directed to each of these statutes, and in the arguments addressed to me emphasis has been attached to certain changes in language and content which have accompanied the development of this branch of the law. Some of these will require consideration, but the first matter, to which I now turn, is the scope and effect of section 206 of the Public Health Act, 1936, which defines the obligation to which the counterclaim is in substance directed.

[His Lordship read section 206 (1) (3) of the Public Health Act, 1936.]

It will be noted that the undertaking in section 206 (1) of the Public Health Act, 1936, which occasions notice to the welfare authority is in respect of the nursing and maintenance of a child apart from his parents, and the language of subsection (3) indicates that this means of a child living apart from his parents. The nature of the separation so expressed is wider than physical absence. Physical absence, if sufficiently prolonged, might well justify an inference of intention to part, and equally occasional meetings might not justify an inference of an intention not to part, but an actual or inferred intention to deny to the child parental guidance and control or, what amounts to the same thing, inability to provide it, must be associated with physical separation before the apartness upon which the need for this type of protection is based can be created.

Such parental guidance and control must of necessity be in part susceptible of delegation. In their personal capacity the parents cannot always be available to provide it and may often be unable effectively to discharge its obligations. In such cases, the employment or engagement of nurses, tutors, doctors and surgeons, or other skilled persons, although such arrangement may involve the temporary surrender of direct control, cannot fairly be regarded as a denial of parental obligation.

Here again, attention must be had to the extent and duration of such delegation. If in sum it can fairly be regarded as tantamount to complete surrender of authority, or if by reason of its duration it results in the substitution of a mind independent of the parent in respect of material decisions for some indefinite period, it may be that an inference of an intention to part from the child could be drawn. But mere delegation of some part of the parental duty for a limited period cannot of itself provide a sufficient animus which, combined with the fact of absence from home, would constitute the status of living apart.

The section deals with an undertaking for the nursing and maintenance of the child, a requirement which is plainly not co-extensive with the full parental duty. Nursing and maintenance excludes, for instance, such matters as moral and religious training and preparation for trade or profession. The expression is concerned with the day-to-day requirements for the support of the physical being, and adds to these the responsibility for their ordering, although not, in my judgment, any necessity for personal intervention in the manner of their fulfilment.

In the Infant Life Protection Act, 1872, s. 2, and the Infant Life Protection Act, 1897, s. 2, the comparable expression used was "nursing or maintaining," the substitution of "and" for "or" being introduced by the Children Act, 1908, when the age limit was raised from five to seven years, which substitution has been retained in the later statutes. Some argument was addressed to me on this variation of language in relation to the contention that in the Act of 1936 "nursing" must be construed to mean "sick nursing." It is, I think, plain that, in relation to children of five and under, nursing and maintenance can fairly be regarded as equivalents, the maintenance of the child being conducted in the manner known to and sometimes performed by the child's nurse or nanny. This would mean that nursing in the Acts of 1872 and 1897 would not be synonymous with sick nursing. The Children Act, 1908, the Children and Young Persons Act, 1932, and the Public Health Act, 1936, apply to children from birth up to ages above five, and it may well be that in the higher age range the importance attached to nursing—in the sense of mothering—may be thought to have diminished and that the child might be expected to develop sufficient self-reliance to be able to dispense with it, at any rate, when in health. The word "nursing," in my judgment, in the phrase "nursing and "maintenance" where it appears in section 206 is not limited to sick nursing, although it includes it, and means doing whatever is necessary to make the maintenance effective. In this sense, it will apply equally throughout the whole of the age range covered by the Act, and the subsequent extensions of that range introduced since 1936.

It was further argued that an undertaking to board a child, if accompanied by or incidental to an undertaking to educate it, was outside the scope of the child life protection provisions. If it be assumed that an undertaking to board a child amounts to an undertaking to nurse and maintain it, the further obligation to educate it is additive and could not diminish the effect of the undertaking to board, although it might set some limit to the period of it. Any such limitation of period would not exclude compliance with the statute, and the terms of section 219 (2) clearly imply that a succession of periods of maintenance, even if each is of short duration, is contemplated as importing the obligations of the statute.

It was further argued that a voluntary arrangement entered into by proprietors of a boarding school with a parent to receive a child into their establishment cannot be within the Act because of the provisions of sections 212 and 220. Section 212 relates to the removal of the child from unsuitable premises or from the care of unsuitable persons, and gives power to a court of summary jurisdiction to order removal until the child "can be "restored to his relatives," the word "relatives" being defined in section 220 in language which excludes parents. An examination of the contemporaneous Public Health (London) Act, 1936, discloses that such exclusion of parents formed no part of the child life protection provisions in the metropolis, and its presence in the main statute may have derived from a failure to appreciate the distinction between the effect of section 11 (2) of the Children Act, 1908, from which its language appears to have been taken, and its effect in the Act of 1936.

However this may be, it is not necessary to construe either of these sections to find the answer to this argument. If the legislature had intended to modify for all parts of the kingdom other than the London area the whole structure of the pre-1936 child life protection provisions by making an exception for arrangements voluntarily entered into by a parent, and despite the fact that such arrangements were made with an unsuitable person or related to reception in unsuitable premises, a clear and specific provision to this effect would have appeared. To infer such an intention from the language used in relation to circumstances wherein the health and wellbeing of a child are thought to be in danger requires the attribution of such irresponsibility to the legislature as to make the argument wholly untenable, and I reject it.

One further argument falls to be considered. It was urged that the undertaking necessary to bring the Act into operation must cover the performance of every act requisite for the nursing and maintenance of the child, and in particular the supply of clothing. In my judgment, there is no such short cut to the determination of every case. If the person undertaking the care of the child chooses to arrange for the supply of clothing to come from a particular source, even though that source be the parent of the child, he is only thereby discharging a portion of his undertaking. If, on the other hand, the parent is retaining the care of the child, but desires to arrange for the child's clothes to be bought on his account by another, the mere fact that they are so bought does not transfer the responsibility for the caring. The fact of the matter is that the introduction of a provision relating to any isolated aspect of nursing and maintenance would, in all probability, if the rest of the circumstances indicated an intention to relinquish care of the child, be interpreted de minimis and treated as an unsuccessful attempt to evade the operation of the Act. Equally, an insistence by a schoolmaster upon the provision for and wearing by the pupils of school uniform would not of itself be regarded as ousting the direction and control of the parent, for it would be consistent with a willingness to exercise it in a manner conformable to the rules of the school.

The evidence established that the plaintiffs, as joint proprietors, carried on an educational establishment as an independent school at which they received boarders at a fee of 68 guineas a term. This fee did not include the cost of providing clothing for the pupils, but it was admitted by the plaintiffs that, with the permission of the parent or guardian and at his expense, the second-named plaintiff would procure clothes for the child if requested so to do.

The substance of the case can be determined by considering the 102 full fee-paying pupils in residence on December 9, 1951, of whom 23 were paid for by or on behalf of parents and 79 by local authorities. Of these 79, one was the subject of a probation order in which residence at the school was made a condition, nine were in the care of the local authority under the provisions of the Children Act, 1948, Part I, and one was the subject of a "fit person" order under the Children and Young Persons Act, 1933, s. 62 (1). The local authority has under section 75 (4) of the latter Act, while the order is in force, the same rights and powers and is subject to the same liabilities in respect of the child's maintenance as if he were the parent, and the child shall continue in his care notwithstanding any claim by a parent or any other person. Similarly, under the Children Act, 1948, s. 3 (1), all the rights and powers of the parent or guardian shall vest in the local authority. It is therefore plain that no real distinction can be drawn between the two main categories of children—that is, fees paid by parents and fees paid by local authorities—for in paying the fees the local authority was doing so as the alter ego of the parent, and in part discharge of the obligation imposed by the "fit person" order to undertake the care of the child. No evidence was called to establish any intention, whether on the part of a parent or of a local authority, when entering into an agreement with the plaintiffs, specifically to relinquish the care of any child, and the question of the application of the Public Health Act, 1936, falls to be determined upon inference from the fact of sending the child to the school and payment of fees.

Does this establish that the children so sent and paid for were apart from their parents? Is a child, temporarily and intermittently transferred from its home to a boarding school, denied the parental guidance and control the absence of which it is the purpose of the child life protection provisions to seek to remedy? So far as concerns all the fee-paying pupils, other than the nine in the care of a local authority under the Act of 1948, and the one entrusted to a local authority as a "fit person" under the Act of 1933, the answer seems plain enough. They all had parents and homes to which they returned when the school term concluded, save in a few instances when parents had made special arrangements for the holiday periods. At any time a parent could visit the school to satisfy himself that such duties in respect of his child's upbringing as he had delegated to the school authorities were being capably and conscientiously discharged. If he was dissatisfied, nothing could prevent him from removing the child, for he had surrendered none of his parental rights.

Nor are the ten others in any different case. The correspondence shows, as one would have expected of a person entrusted with the care of a child, that the particular local authority responsible for sending the child to the school maintained adequate supervision during the school term. It is true that for convenience this supervision was entrusted to the children's officer of the defendant authority, but in exercising it he was acting as and for the delegating authority.

None of these children can, in my judgment, properly be regarded as being apart from their parents, and this is a sufficient reason for refusing to declare them to be "foster-children" within the meaning of Part VII of the Public Health Act, 1936. It is not therefore necessary to decide whether the acceptance of these children by the plaintiffs at Farney Close School, admittedly for reward, amounts to or includes undertaking their nursing and maintenance. It is clear that the physical requirements of these children were being met and that they were being nursed and maintained upon premises in the possession and under the control of the plaintiffs by persons directly responsible to the plaintiffs. The point having been argued, it should suffice to say this, that if the ultimate authority over such care of the children should not reside, as I have already held it does, in the actual or notional parent I cannot, as at present advised, see any other person on whose behalf the plaintiffs could be said to be performing the duties.

In the result, therefore, I must reject the contention upon which the counterclaim is based, and I can make no declaration as prayed.

Counterclaim dismissed.

Solicitors: *Barnes & Butler for J. W. Miller & Son, Poole; Walters & Hart for C. P. Brutton, Dorchester.*

I. G. R. M.

C. A.

1954
May 10, 11,
12, 13;
June 3.

Evershed M.R.,
Jenkins and
Hodson L.JJ.

CAMILLE AND HENRY DREYFUS FOUNDATION INC. *v.* INLAND REVENUE COMMISSIONERS.

Revenue — Income tax — Charity — Foreign body—Corporation incorporated in U.S.A. for charitable purposes — Whether entitled to exemption from income tax—"Any body of persons or trust established for charitable purposes only"—Meaning—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 37 (1).

Charity—Public—Foreign objects. Evidence—Foreign law—Construction of document — Admissibility of evidence of foreign lawyer. Statute—Construction—Subsequent enactments—Whether relevant in interpreting earlier Act. "Any body of persons."

The plaintiff corporation was a body incorporated in the State of New York as a membership corporation under the Membership Corporation Law of that State. Its objects were exclusively charitable according to the law of the United Kingdom. The corporation was resident outside the United Kingdom and had never conducted any operations in this country. The corporation applied to the Commissioners of Inland Revenue for exemption from income tax in respect of the corporation's income derived from certain royalties in this country, which was liable to tax under Case III of Schedule D, on the ground that the corporation was "a body of persons" "established for charitable purposes only" and so entitled to exemption under section 37 (1) (*b*) of the Income Tax Act, 1918. The Special Commissioners accepted the evidence of legal experts as to the construction of the foundation's certificate of incorporation under the law of New York.

Held, (1) that, in the phrase "body of persons established for "charitable purposes only" in section 37 (1) (*b*) of the Income Tax Act, 1918, "for charitable purposes only" meant for purposes which were what the laws of the United Kingdom defined as charitable and which the courts there held to fall within the special significance of that word.

(2) That, the exemption in section 37 (1) (*b*) was limited to "a body of persons" so constituted and regulated as to be in reference to the income in question subject to the jurisdiction of the United Kingdom courts, and that a foreign corporation carrying on its activities abroad was not entitled to the exemption conferred by that section.

(3) That, if there were any ambiguity in the construction of section 37 (1) (*b*), recourse could be had to the construction placed by Parliament on that section by section 21 of the Finance Act, 1923, section 32 of the Finance Act, 1924, and section 21 of the Finance Act, 1925, from which it appeared that, on the secession of the Irish Free State, Parliament considered that Irish Free State charities would no longer be entitled to claim exemption from income tax under section 37 in the absence of legislation continuing it in their favour.

(4) That it was competent for a New York lawyer to state, as

an expert, his opinion on the question how the language of the Membership Corporation Law of New York would, in the circumstances of this case, be construed by the courts of that State.

Dictum of Lawrence J. in *Inland Revenue Commissioners* v. *Gull*, 21 T.C. 374, 378; 54 T.L.R. 52; [1937] 4 All E.R. 290 considered.

In re Robinson [1931] 2 Ch. 122; 47 T.L.R. 264 considered.

Income Tax Special Purposes Commissioners v. *Pemsel* [1891] A.C. 531; 7 T.L.R. 657; 3 T.C. 53; *Cape Brandy Syndicate* v. *Inland Revenue Commissioners* [1921] 2 K.B. 403; 37 T.L.R. 402; *Ormond Investment Co. Ld.* v. *Betts* [1928] A.C. 143 and *Inland Revenue Commissioners* v. *Dowdall, O'Mahoney & Co. Ld.* [1952] A.C. 401; [1952] 1 T.L.R. 560; [1952] 1 All E.R. 531 applied.

Decision of Wynn-Parry J. affirmed.

APPEAL from Wynn-Parry J.

The plaintiffs, the Camille and Henry Dreyfus Foundation Inc. (hereinafter called " the foundation "), was a corporation constituted under the Membership Corporation Law of the State of New York. Its certificate of incorporation provided: " 1. The name of " the corporation is the Dreyfus Foundation Inc. 2. The pur- " poses for which it is formed are: (*a*) To advance the science of " chemistry, chemical engineering and related sciences as a means " of improving human relations and circumstances throughout the " world: (1) by providing funds or services to and for individuals " without regard to race, sex, creed, colour or age, who have " excelled or shown promising ability in such fields of science and " who would benefit by such assistance in pursuing further their " studies or research in such fields of science; (2) by providing " funds or services to or for organizations which afford facilities " for the production, collection or dissemination of beneficial " information and the control of potentially harmful information " relating to such fields of science; and (3) by engaging in any " and all forms of activity which will employ the science of " chemistry, chemical engineering and relating sciences to serve " or accomplish the purposes of the foundation, including the " creation and maintenance of laboratories, research bureaux or " agencies and facilities for the exchange, publication, distribu- " tion, co-ordination and control of scientific information; and " (*b*) To promote any other scientific, educational or charitable " purposes."

After setting out in clause 2 (*c*) the various incidental powers as regards the holding of property and so forth, the certificate of incorporation proceeded as follows: " 3. No part of the net income " of the corporation shall inure to the benefit of any private "member or individual, and no member, director, officer or "employee of the corporation shall receive or be lawfully entitled "to receive any pecuniary profit of any kind therefrom, except "reasonable compensation for services in effecting one or more of "its purposes. 4. The territory in which the operations of the "corporation are principally to be conducted is the United States "of America, its possessions and dependencies, but the operations "of the corporation shall not be limited to such territory. 5. The "city in which its principal office is to be located is the City of "New York, County and State of New York."

The foundation had at all material times been resident outside the United Kingdom and had never conducted any operations in this country. The foundation was in receipt of a large income derived from certain royalties payable by British Celanese Ld., a company resident in this country. That income was liable to income tax under Case III of Schedule D of the Income Tax Act, 1918. The foundation claimed exemption from income tax in respect of that income for the years 1946–47 to 1950–51 inclusive under section 37 (1) (*b*) of the Income Tax Act, 1918.[1]

The claim of the foundation to exemption from tax was rejected by the Commissioners of Inland Revenue. On appeal, the Special Commissioners also rejected the claim. They held, first, that they were bound by the decision of Lawrence J. in *Inland*

---

[1] Income Tax Act, 1918, s. 37: "(1) Exemption shall be granted— "(*a*) from tax under Schedule A "in respect of the rents and profits "of any lands, tenements, hereditaments, or heritages belonging to "any hospital, public school or "almshouse, or vested in trustees for "charitable purposes, so far as the "same are applied to charitable purposes only: Provided that any "assessment upon the respective properties shall not be vacated or "altered, but shall be in force and "levied, notwithstanding the allowance of any such exemption; (*b*) "from tax under Schedule C in respect of any interest, annuities, "dividends or shares of annuites, and "from tax under Schedule D, in respect of any yearly interest or other "annual payment, forming part of "the income of any body of persons "or trust established for charitable "purpose only, or which, according to "the rules or regulations established "by Act of Parliament, charter, decree, deed of trust, or will, are applicable to charitable purposes only, "and so far as the same are applied "to charitable purposes only; (*c*) from "tax under Schedule C in respect of "any interest, annuities, dividends "or shares of annuities, in the names "of trustees, applicable solely towards "the repairs of any cathedral, college, "church or chapel, or any building "used solely for the purpose of divine "worship, and so far as the same are "applied to those purposes."

S. 40: "(4) A person who makes a "false or fraudulent claim for exemption under the said sections in "respect of any interest, annuities, "dividends or shares of annuities "charged or chargeable under Schedule C shall forfeit the sum of one "hundred pounds, and if such claim "is made by any person in his own "behalf he shall in addition be "liable to be charged in treble the "tax so chargeable."

Revenue Commissioners v. *Gull* [2] to hold that the foundation, not being a body of persons established in the United Kingdom, was precluded from relief under section 37, but secondly, that, if they were wrong on the first question, the foundation was a body of persons established for charitable purposes only.

Wynn-Parry J., on February 18, 1954, dismissed the appeal by case stated of the foundation from the decision of the Special Commissioners.

The foundation appealed.

Heyworth Talbot Q.C. and *Philip Shelbourne* for the foundation. The foundation claims that it is a " body of persons " established for charitable purposes only," and as such entitled to relief from income tax under section 37 (1) (*b*) of the Income Tax Act, 1918. To be entitled to relief under that section the foundation must show: (1) that it is established, (2) for charitable purposes only, and (3) that its income is applied for charitable purposes only. This exemption is first found in section 5 of the Income Tax Act of 1799, where the wording is the same. The word " established " is not a term of art. It means no more than formed: *Inland Revenue Commissioners* v. *Yorkshire Agricultural Society*.[3] It cannot be disputed that the foundation is established. The foundation's case is that, this being a taxing Act, it is a fundamental principle of construction that nothing should be read into it and nothing taken out and, if possible, effect must be given to the language used. It is admitted that in section 37 " charitable purposes " means charitable purposes according to English law. A purpose may be a valid charitable purpose according to English law, although the English courts cannot enforce it. This appears from the decision in *In re Robinson*,[4] where a trust to be administered in Germany for the benefit of German soldiers disabled in the 1914–18 war was held to be good. The exemption is granted by section 37 (1) (*b*) to " any " body of persons established for charitable purposes. The foundation is within that phrase, giving to the words their natural meaning. The foundation, a foreign corporation, being liable to be charged to tax in this country, should equally be entitled to the statutory exemptions.

Wynn-Parry J. misdirected himself when considering the effect of section 21 of the Finance Act, 1923, section 32 of the

---

[2] 21 T.C. 374, 378; 54 T.L.R. 52; [1937] 4 All E.R. 290.

[3] [1928] 1 K.B. 611; 44 T.L.R. 59; 13 T.C. 58.

[4] [1931] 2 Ch. 122; 47 T.L.R. 264.

Finance Act, 1924, and section 21 of the Finance Act, 1925. These sections merely show that Parliament, when enacting them, considered that section 37 of the Act of 1918 did not apply to a foreign corporation. The construction which Parliament placed on section 37 can be prayed in aid only if there is any ambiguity in the terms of the section. This appears from the speech of Lord Buckmaster in *Ormond Investment Co. Ld.* v. *Betts*,[5] and from *Inland Revenue Commissioners* v. *Dowdall, O'Mahoney & Co. Ld.*[6] [Reference was also made to *In re Westby's Settlement*[7] and *John Hudson & Co.* v. *Kirkness*.[8]]

The Crown's case is that in some way or other some limitation must be read into section 37 in order to restrict the natural meaning of the words. There is no justification for such a construction apart from the dictum of Lawrence J. in *Inland Revenue Commissioners* v. *Gull*.[9] That dictum was obiter and based on the construction put by Parliament in later Acts on section 37, and proceeded on the footing that the interpretation of Parliament in a later Act governed the construction of an earlier Act. The authorities show that that is not so.

Philip Shelbourne following. It appears from the decision in *Pemsel's* case[10] that a charity may obtain the benefit of relief from tax although it is carrying on its charitable activities outside the jurisdiction. This is a stronger case than that. The principle there laid down was reaffirmed in *Inland Revenue Commissioners* v. *City of Glasgow Police Athletic Association*.[11]

Borneman Q.C., *J. H. Stamp* and *Sir Reginald Hills* for the Crown. It is submitted, first, that both as a matter of construction and of presumption section 37 (1) (*b*) of the Act of 1918 is restricted in its operation to a body of persons subject to the jurisdiction of our courts. The Income Tax Acts impose a charge to tax for the benefit of the inhabitants of this country. The tax is charged primarily on residents and on income made here of persons resident elsewhere. The charge having been first imposed, exemption is then granted to charities. It is reasonable to assume that the exemption is intended only to apply to charities operating for the benefit of the public of this country. That view of the intention of section 37 (1) (*b*) is reinforced by the wording of the section. There should not be imported into the section the words of charge in other sections of the Act. The authorities confirm that view. *Jefferys* v. *Boosey*[12] is authority for the proposition that only persons within the allegiance of the Crown can claim relief in respect of income tax. The decisions in *Wallace* v. *Attorney-General,*[13] *In re Pearson,*[14] *Astor* v. *Perry,*[15] and *Nestlé Co. Ld.* v. *Inland Revenue Commissioners*[16] confirm the view that where Parliament grants relief from a tax that relief is limited to those within the jurisdiction.

---

[5] [1928] A.C. 143, 154; 13 T.C. 400.

[6] [1952] A.C. 401; [1952] 1 T.L.R. 560; [1952] 1 All E.R. 531.

[7] [1950] Ch. 296; [1950] 1 All E.R. 479.

[8] [1953] 1 W.L.R. 749; [1953] 2 All E.R. 64.

[9] (1937) 21 T.C. 374, 378; 54 T.L.R. 52; [1937] 4 All E.R. 290.

[10] [1891] A.C. 531; 7 T.L.R. 657; 3 T.C. 53.

[11] [1953] A.C. 380; [1953] 1 All E.R. 747; 34 T.C. 76.

In re Robinson,[17] having regard to the observations of Lord Simonds in *Inland Revenue Commissioners* v. *National Anti-vivisection Society,*[18] would appear to have been wrongly decided.

Parliament has stated in unequivocal terms in the Finance Acts of 1923, 1924 and 1925, that section 37 of the Act of 1918 does not apply to foreign corporations. If the meaning of section 37 is not clear—the Crown contends that it is clear—and the section is ambiguous, it is established by *Cape Brandy Syndicate* v. *Inland Revenue Commissioners,*[19] *Union Corporation Ld.* v. *Inland Revenue Commissioners,*[20] *Ormond Investment Co. Ld.* v. *Betts*[21] and *Penang and General Investment Trust Ld.* v. *Inland Revenue Commissioners,*[22] that resort can be had to the construction which Parliament has placed on the section in question in a later Act.

With regard to the second question, namely, whether the foundation is established for charitable purposes only, it is contended that, having regard to the provisions of clause 2 (*b*) of its certificate of incorporation, it is not so incorporated. The answer to this question depends on whether paragraph (*b*) must be regarded under the law of the State of New York as deleted. The Special Commissioners and Wynn-Parry J. were wrong in accepting the construction put on paragraph (*b*) by the expert witnesses. Such witnesses cannot properly give an opinion on the meaning and effect of ordinary English words.

---

[12] (1854) 4 H.L.C. 815.

[13] (1865) 1 Ch.App. 1.

[14] [1892] 2 Q.B. 263; 8 T.L.R. 622.

[15] [1935] A.C. 398; 51 T.L.R. 325; 19 T.C. 255.

[16] [1953] Ch. 395; [1953] 1 All E.R. 877.

[17] [1931] 2 Ch. 122; 47 T.L.R. 264.

[18] [1948] A.C. 31; 63 T.L.R. 424; [1947] 2 All E.R. 217; 28 T.C. 311.

[19] [1921] 2 K.B. 403; 37 T.L.R. 402.

[20] [1953] A.C. 482; [1953] 2 W.L.R. 615; [1953] 1 All E.R. 729; 34 T.C. 207.

[21] [1928] A.C. 143.

[22] [1943] A.C. 486; 59 T.L.R. 237; [1943] 1 All E.R. 514; 25 T.C. 49.

J. H. Stamp following. In a taxing Act " charity " means a charity which is subject to the protection of the Crown which, as parens patriae, is the constitutional protector of all charities: Halsbury's Laws of England, 3rd ed., vol. 4, p. 407; *Attorney-General* v. *Brown.*[23] A foreign charity is outside such protection. Further, a charity must be for a public purpose. The basis of the exemption is that it benefits the public. A foreign charity does not benefit the public of the United Kingdom. The language of the section shows that its operation is local. The reference to charities established by Act of Parliament confirms this. This can only mean the Imperial Parliament. Further, the administrative difficulties of applying the section to foreign charities are insuperable. The Commissioners of Inland Revenue would have no means of knowing whether a charity established in any part of the world fell within the definition of charity in this country, and whether the trust income was in fact applied for charitable purposes. It is not legitimate to divide paragraph (*b*) of section 37 (1) into two parts and say that " any body of persons " is entitled to exemption if it is " established for charitable pur- " poses only," whether or not a trust established for such purposes is or is not so entitled under the second limb. Paragraph (*b*) must be read as a whole. The final words of the paragraph apply to the whole.

Heyworth Talbot Q.C., in reply, was not called on to argue whether the foundation was established for charitable purposes only. A charity may be a good charity and entitled to exemption from income tax, although it confers no benefit on the public of the United Kingdom. Charities for religious purposes operating abroad are an example of such charities. *In re Robinson* [24] was rightly decided. That was a charity for foreign beneficiaries. There is no geographical limit on the area in which a charity may operate.

The caption to sections 37, 38 and 39 helps neither party. The Act of 1918 was a consolidation Act. The fact that sections 37, 38 and 39 are grouped together for convenience should not affect the construction placed on section 37. Section 37 must be construed according to its terms. There is nothing in the section to cut down the ordinary meaning of " any body " of persons." The words are of wide import. It is not necessary or proper to restrict the generality of the words in the first part of paragraph (*b*) by the restricting words in the latter part. There are several cases in the Act of 1918 where the term "body" includes a foreign corporation. Schedule D expressly charges foreign persons. In the General Rules applicable to Schedules A, B, C and D, "body of persons" includes foreign bodies. The contention that if the exemption is held to apply to foreign charities great administrative difficulties will result is not sound, since the burden of proving a right to relief will in every case rest on the claimant.

---

[23] (1818) 1 Swanst. 265.

[24] [1931] 2 Ch. 122.

The need that every charity shall benefit the public is satisfied if it benefits some section of the world public. It is not necessary that the public of the United Kingdom alone should benefit. The foundation is within the language of section 37 and is accordingly entitled to claim exemption. [Reference was also made to Tyssen on Charitable Bequests, 2nd ed., p. 172; *Sheldrick* v. *South African Breweries Ld.*[25]; *Inland Revenue Commissioners* v. *Dalgety & Co. Ld.*,[26] and *In re Hadden.*[27]]

Cur. adv. vult.

June 3. The following judgments were read.

EVERSHED M.R. In this case the Camille and Henry Dreyfus Foundation Inc., a corporation which, as its name indicates, is a foreign corporation, constituted according to the laws of the State of New York, and to which I will hereafter refer as "the "foundation," has appealed against the refusal of the Commissioners of Inland Revenue to admit a claim on its part to exemption from income tax for the tax years 1946–47 to 1950–51 inclusive. In respect of each of those years the foundation was in receipt of large sums (the gross amount of which for the whole five year period is over a quarter of a million pounds), being payments by way of royalties from an English company, British Celanese Ld. It is not in dispute that tax is properly payable by the foundation in respect of these sums unless relief therefrom is obtainable under section 37 of the Income Tax Act, 1918. It is and has, however, been the case of the foundation that it is entitled to exemption on the ground that the sums in question form part of the income of a

---

[25] [1923] 1 K.B. 173; 39 T.L.R. 26.

[26] [1930] A.C. 527; 46 T.L.R. 349; 15 T.C. 216.

[27] [1932] 1 Ch. 133; 48 T.L.R. 9.

C. A.
1954

Camille and Henry Dreyfus Foundation Inc.
v.
Inland Revenue Commissioners.

Evershed M.R.

"body of persons . . . established for charitable purposes only" within the terms of paragraph (*b*) of section 37 (1) of the Act, the income in question having in fact been applied exclusively for such purpose.

It has been conceded on the part of the foundation that by the phrase "for charitable purposes" is meant purposes which are by the law of the United Kingdom understood to be, or defined as being, "charitable," that is, within the scope and intendment of the preamble to 43 Eliz. 1, c. 4; but it has been the foundation's case that, though "established" by the laws of New York State (that is, constituted as a membership corporation according to New York law), and though carrying on all its activities in that State or in the United States of America, nevertheless the character of its activities, having regard to the terms (as interpreted according to the evidence of New York lawyers) of its certificate of incorporation, is such as to qualify them as "charitable" under our law. Upon this point the finding of the Special Commissioners was favourable to the foundation; and, in the circumstances, Wynn-Parry J. expressed no view upon it. But the Special Commissioners also held that, in order to obtain the privilege of exemption under section 37 (1) of the Act, the "body of persons" claiming such privilege must be one "established" under and in accordance with the laws of the United Kingdom; in other words, the foundation, being a foreign corporation not subject to the jurisdiction of our courts, is ipso facto debarred from the benefits of section 37.

Upon this matter Wynn-Parry J. upheld the decision of the Special Commissioners, regarding himself as bound by the decision and reasoning of Lawrence J. in *Inland Revenue Commissioners* v. *Gull*,[1] referred to by the Special Commissioners in their case stated. In the cited case, Lawrence J., after indicating that he would himself have been disposed to construe the words "any body of persons . . . established" as comprehending a body established in fact, for the requisite purposes, in any part of the world, "felt constrained" by certain later Acts of Parliament, clearly proceeding upon the basis of the more limited interpretation, to hold that the bodies of persons indicated in section 37 (1) were bodies established under and in accordance with our laws.

As the matter is res integra in this court, it will be necessary for me at a later stage to express my opinion on the view taken by Lawrence J., as it will also be desirable, having regard to the argument we have heard, for me to express my view on the validity of the finding of the Special Commissioners in the foundation's favour that its objects are exclusively "charitable" as understood by our law.

---

[1] 21 T.C. 374, 378; 54 T.L.R. 52; [1937] 4 All E.R. 290.

The first question being, as I have said, res integra in this court, is plainly a matter of the interpretation of the few relevant words in section 37 (1) and may therefore be said to fall within a small compass. We heard from both sides considerable argument on general considerations addressed to what was called the proper approach to the essential matter of construction. Thus, on the part of the foundation, we were reminded of the need in taxing statutes—indeed in all statutes—to interpret the words according to their ordinary sense and to avoid reading into the language used other words not clearly required by the context itself. It was also urged upon us, as a matter of principle, fairness and sense, that if (as in the present case) a non-resident was made liable to suffer tax on income arising in this country no less than a resident, then the non-resident, like the resident, should be entitled to the benefit of any relevant exemption.

On the part of the Crown it was submitted that, since all taxation was raised by Parliament for employment for the benefit of the kingdom, so the logic of exemption was prima facie to be found in the parliamentary view that the income exempted would be used or applied in a manner so beneficial to the community as to outweigh the claim to tax it—a consideration which could have no place where the income belonged to a non-resident and was used by him outside the United Kingdom. Mr. Borneman also cited a number of cases, beginning with *Jefferys* v. *Boosey*,[2] in support of the general proposition that, when Parliament imposes obligations or confers privileges upon any classes of persons specified in its enactments, it must be taken prima facie to be confining its purpose to persons or bodies of persons resident in, or subject to the jurisdiction of the courts of, the United Kingdom. The proposition, as such, is no doubt incontrovertible. But I cannot think that it plays a useful part in the solution of the present problem. The term "body of persons" is defined thus in section 237 of the Act: "'Body of persons' means "any body politic, corporate, or collegiate, and any company, "fraternity, fellowship and society of persons, whether corporate "or not corporate."

The words in the definition are of very wide import. But even if, by application of the general principle above cited, they might otherwise prima facie have been confined to bodies of persons within the United Kingdom or subject to the jurisdiction of its courts, it is quite clear that they are in fact used (and appropriately used) in certain parts of the Act to comprehend foreign or wholly non-resident bodies: see, for example, rule 1 of the All Schedules Rules when read together with paragraph 1 (*a*) (iii) of Schedule D.

---

[2] (1854) 4 H.L.C. 815.

In these circumstances, it does not appear to me that any a priori inference can be relied upon in favour of limiting the term " body of persons " in section 37 (1). I have not indeed, for my part, found any of the more general arguments to which I have alluded of material significance one way or the other in the present case. The answer to the problem posed must, in my judgment, depend upon the true interpretation, according to ordinary principles, of the relevant phrase—and, as I think, of the essential word therein " established "—in the context in which it is found in section 37 (1).

The section itself is the first of a group which follows the cross-heading " Relief to Charities, Friendly Societies, etc." It is section 37 which picks up the word " charities," and I will return to it presently. Section 38 is concerned with the British Museum. Friendly societies form a part of the subject-matter of section 39, and it is not in doubt that by " friendly societies " is meant societies constituted, regulated by and subject to, our own laws. So in the succeeding parts of section 39 the bodies or corporations, anticipated by the word " etc." in the cross-heading, are also bodies or corporations constituted and regulated by, and subject to, the laws of the United Kingdom. The final section, 40, deals with penalties and is applicable to all the preceding sections in the group, including section 37. The final subsection, (4), may be quoted in full: " A person who makes a false or " fraudulent claim for exemption under the said sections in respect " of any interest, annuities, dividends or shares of annuities " charged or chargeable under Schedule C shall forfeit the sum " of one hundred pounds, and if such claim is made by any " person in his own behalf he shall in addition be liable to be " charged in treble the tax so chargeable."

As was observed during the argument, this subsection, with its penalty of treble tax, would be, to say the least, administratively difficult, if not inappropriate, in the case of a non-resident.

If, then, the " body of persons " referred to in section 37 (1) (*b*) includes foreign or non-resident bodies, it must be conceded at least that they are in that respect alone of all the bodies and associations referred to in the group of sections. I turn, then, next to the word " charities," which in the cross-heading must be taken to introduce them. And by " charities " must, I take it, be meant " charitable institutions." To my mind, the words " charities " or " charitable institutions " in an ordinary context in an English Act of Parliament or any English document must (prima facie at least) mean institutions regulated by, and subject to the jurisdiction of, the laws or the courts of the United Kingdom and constituted for the carrying out of objects or purposes which, in the courts of the United Kingdom and nowhere else, would be held to be " charitable." In my judgment the two aspects or characteristics are almost inseparable. The law relating to charities or charitable trusts is a peculiar and highly complex part of our legal system. An Act of Parliament which uses the words " charity " or " charitable " must be intending to refer to that special and characteristic, if not in some respects artificial, part of our law.

Mr. Heyworth Talbot was not, I think, disposed to dissent from what I have so far said; and he agreed that the charitable purposes for which exclusively the " bodies of persons " must be " established " are purposes which would be " charitable " according to our law. But none the less, he contended, there was nothing in the material language of section 37 sufficient to justify any local limitation of the " bodies of persons " named.

The result, in my judgment, would be at least awkward and artificial. There is contemplated, according to the argument, a " body of persons " established, that is constituted, according to the law of, say, the State of New York or of France or of any other country in the world, whose objects and the extent of whose powers would therefore depend upon or be regulated by, and would have to be defined and interpreted by, the laws of that country; yet those powers and objects, so regulated and interpreted, must find their place somehow within the scope and meaning of the Elizabethan preamble, as expounded by the decisions of our courts. Mr. Heyworth Talbot says that the difficulty of the conception is, at most, administrative—the onus is upon the foreign claimant for relief and, unless he proves his case, he fails to obtain it. I will leave aside the administrative difficulty, great though I think it is, and further enhanced by the condition at the end of paragraph (*b*), " so far as the same " (i.e., the sums liable to be taxed) " are applied to charitable " purposes only." In my judgment it is in the conception itself

—the conception of a corporation regulated according to the laws of a foreign country and carrying on the whole of its activities in that country and yet being able to show by reference to the standard of the Elizabethan preamble and to the decisions of our courts thereunder that it is "established for charitable purposes "only"—that I find what appears to me to be an inherent incompatibility.

In the many cases, which in recent years have received the consideration of the House of Lords, emphasis has time and again been laid upon the necessity in every case (with the single exception of the so-called "poor relations cases") of the requisite element of public benefit or benefit to the community. What "public," what "community," is contemplated? I should have thought, I confess, at first sight that the answer was—the public, the community, of the United Kingdom. It is also a significant characteristic of our system that to the Attorney-General representing the Crown, as parens patriae, belongs the right and duty of invoking the powers of the courts to secure the due execution of charitable trusts—a power and duty which postulate that the charitable institution itself should be subject to the jurisdiction of our courts. It is difficult to see how these principles or characteristics can have any application to a foreign institution conducting all its activities abroad. I cannot, however, find that the meaning and scope of the requirement of a "benefit to the "community" have ever been judicially considered from this point of view. On the contrary, there are undoubtedly instances of trusts being held or regarded as charitable which were exclusively for the benefit of objects outside the United Kingdom. *Income Tax Special Purposes Commissioners* v. *Pemsel* [3] is indeed one of them.

It may be that, on very broad and general grounds, relief of poverty or distress in any part of the world, or the advancement of the Christian religion in any part of the world, would be regarded as being for the benefit of the community in the United Kingdom. I see, however, formidable difficulties where the objects of the trust were, say, the setting out of soldiers or the repair of bridges or causeways in a foreign country. To such cases the argument of public policy (meaning United Kingdom public policy) might be the answer. A somewhat extreme case was that of *In re Robinson*,[4] where Maugham J., after considering a number of authorities, appears clearly to have regarded a gift

[3] [1891] A.C. 531; 7 T.L.R. 657; 3 T.C. 53.

[4] [1931] 2 Ch. 122; 47 T.L.R. 264.

by a testator of his residue to the Government of the German Reich, for the purpose of relieving German soldiers disabled in the First World War, as a good charitable trust.

But, though there are cases in the books in which the application of a fund for objects wholly outside the United Kingdom and the jurisdiction of its courts have been held to be valid charitable trusts, still the question here is, I think, a rather different one. I have not yet considered the particular context of section 37 of the Income Tax Act, 1918. I am considering what, as a matter of ordinary language and common sense, is intended (in the absence of a special context) by the phrase, in an English Act of Parliament or other document, " body of persons " established for charitable purposes only." In my judgment, applying the test I have formulated, once it is conceded that " for charitable purposes only " means " for purposes which are " what the laws of the United Kingdom define as charitable and " hold to fall within the special and somewhat artificial significance of that word," then it seems to me, prima facie, that a body cannot be " established " for such purposes, unless it is so constituted or regulated as to be subject to the jurisdiction of the courts which can alone define and regulate those purposes. In my judgment, that view of the prima facie significance of the words is not affected by the existence of cases like *In re Robinson*.[4] I could better understand it if, in order to qualify under the section, it was sufficient for a body of persons " established " according to the laws of country X to show that it was so established exclusively for purposes which, by the law of country X, were " charitable." But that view is impossible for (as it is conceded) the word " charitable " is a term of art, significant only according to our laws; and it has not been suggested that it could be somehow applied by analogy in country X.

I come at last (as I should perhaps at first) to the context of the section itself and particularly to the use of the word " any " before " body of persons " on which the foundation has strongly relied. [His Lordship read section 37 (1) of the Income Tax Act, 1918, and continued :] In my judgment the context of section 37, so far from assisting or requiring that the relevant formula in paragraph (*b*) should be interpreted in accordance with Mr. Heyworth Talbot's argument, supports and emphasizes the local limitation which, for reasons which I have already given, prima facie, to my mind, attaches to the words. It was conceded (as I understood) that since the lands, tenements, etc., mentioned in paragraph (*a*) were necessarily lands, tenements, etc., within the United Kingdom, so the words " any hospital, public school or almshouse " must have the same local limitation. And it was also conceded that by the words " any cathedral, college, church or chapel " and the general words which follow in paragraph (*c*) must have been meant any cathedral, college, etc., within the confines of the United Kingdom. It follows, then, that the wide meaning sought to be attributed to the relevant words in paragraph (*b*) must be justified by the words themselves, which the context is insufficient or inapt to restrict. But it is to be noted, first, that the vital phrase adds to the words " body of persons " the words " or trust." And the word " trust " is a word peculiarly referable to our own system of law.

---

[4] [1931] 2 Ch. 122.

It is true that to other countries, which have adopted our own legal system and essential characteristics, the word " trust " would have a precise and certain significance. But if the foundation's argument is sound, the formula in question should have a universal application, so that the term " body of persons or trust " would be intelligible in reference to countries other than those which have embraced our legal conceptions. Still more significant to my mind is the circumstance that the formula " any body of " persons or trust established for charitable purposes only " is followed by the alternative " or which, according to the rules or " regulations established by Act of Parliament, charter, decree, " deed of trust or will are applicable to charitable purposes only." It is, in my judgment, reasonably clear that the alternative was added in order to cover those cases in which only a part of the income is, by virtue of the Act of Parliament or other instrument named, applicable to charitable purposes, in contradistinction to those bodies of persons or trusts which are exclusively established for such purposes.

In my view, however, the alternatives are true alternatives; the distinction, that is to say, is between institutions, in other respects alike, whose income is either, on the one hand, wholly applicable to the purposes named, or, on the other hand, is, as to the relevant part only, so applicable. And since, in my judgment, it cannot be in doubt that by " Act of Parliament " is meant an Act of the United Kingdom Parliament, so it follows, in my view, that by " charter, decree, deed of trust or will " is meant an instrument of the kind specified subject to, and taking effect according to, the laws of the United Kingdom. The alternative formula must therefore be regarded as wholly limited by reference to our local law; and, if this is so, then, as it seems to me, the earlier phrase " any body of persons or trust established, etc." must be regarded as equally so limited.

In my judgment, therefore, the bodies of persons mentioned in the paragraph cannot comprehend foreign institutions such as the foundation. I have earlier stated my view that the essential word is " established." In my judgment, whatever might be the true significance of the four words " any body of persons " taken in isolation, those words in the context of paragraph (*b*) of section 37 (1) of the Act of 1918, and particularly when immediately followed by the words " or trust established for charitable " purposes only," must be limited to bodies of persons so constituted and regulated as to be (in reference to the income in question) subject to the jurisdiction of the United Kingdom courts. I think that, in the context, the word " any " ceases to be able to confer an unlimited significance and becomes in effect no more emphatic than the indefinite article " a." A body such as the foundation, though incorporated under the laws of a foreign country and being, therefore, a foreign corporation, might derive all its income from the United Kingdom and carry on all its activities in the United Kingdom. In such case (though it is not necessary for me to decide the point) the foundation might successfully assert that it was " a body of persons established for " charitable purposes only." But on the facts of this case, and since the activities of the foundation are carried out exclusively in America, the foundation fails, in my judgment, to bring itself within the terms of section 37 of the Act, and so fails to make good its claim to the exemption which that section confers.

In *Inland Revenue Commissioners* v. *Gull* [5] Lawrence J. held that the trust in question, though for the benefit of persons in the province of Ontario, was nevertheless " established " in the United Kingdom and therefore within the scope of section 37 of the Income Tax Act, 1918. But that judge held—and it follows from what I have said that I think he rightly held—that the privilege of exemption conferred by the section could not be enjoyed by any body of persons established outside the United Kingdom. It does not, however, appear that *Ormond Investment Co. Ld.* v. *Betts* [6] was cited to the judge. The speeches of the noble Lords in that case—and the speeches in the later case before the House of *Inland Revenue Commissioners* v. *Dowdall*,

---

[5] 21 T.C. 374.

[6] [1928] A.C. 143.

O'Mahoney & Co. Ld.[7]—must be taken to have established clearly that an expression, explicit or implicit, by Parliament in a later Act of its intention in an earlier statute cannot be treated as altering, ex post facto, the effect of the earlier enactment according to the proper interpretation of the language therein used. To take but one example from these speeches, I cite the language of Lord Buckmaster in the earlier case[8]: "I do not think that, "in the circumstances of this case, the subsequent statute can "properly be referred to for the purpose of interpreting the earlier. "It is, of course, certain that Parliament can by statute declare "the meaning of previous Acts. It would be competent for "them to do so even though their declaration offended the plain "language of the earlier Act. It would be an unnecessary step "to take, unless it were intended, contrary to the general principles of legislation, to make the explanatory Act retrospective, "seeing that the subsequent statute could by independent enactment do what was desired. It is also possible that where Acts "are to be read together, as they are in this case, a provision in an "earlier Act that was so ambiguous that it was open to two "perfectly clear and plain constructions could, by a subsequent "incorporated statute, be interpreted so as to make the second "statute effectual, which is what the courts would desire to do, "and it is also possible that, where a statute has created a crime "or imposed a penalty, a subsequent Act showing that that "crime was intended to have a limited interpretation or the "circumstances regarded as narrow in which the penalty "attached, would be used for the purpose of giving effect to "the well-known principle of construction to which I referred "at an earlier stage. But I find myself unable to accept what "Sargant L.J. said, that the principles in certain cases are "applicable to the construction of successive Acts of Parliament."

In so far, therefore, as Lawrence J. expressed the view that the terms of section 21 of the Finance Act, 1923, section 32 of the Finance Act, 1924, and section 21 of the Finance Act, 1925, effectively gave, retrospectively, an interpretation to the material terms of section 37 of the Income Tax Act, 1918, which those terms would not otherwise bear, his reasoning would be in conflict with the decisions of the House of Lords to which I have referred. If I am right in the view which I have formed of the proper meaning of section 37 of the Act of 1918, it is unnecessary to pay any regard to the later statutes, and the point does not, therefore, arise. But if I am wrong, then at least, in my judgment, the construction which I prefer is fairly open as an alternative to that for which Mr. Heyworth Talbot has contended. And, in that event, it is equally clear, on the authority of the same cases, that the court will tend to adopt the construction which is in conformity with that inherent in the later legislation in pari materia —particularly where the later enactments are to be read as one with the original Act. So much clearly appears from the passage I have quoted from Lord Buckmaster's speech in *Ormond Investment Co. Ld.* v. *Betts.*[8]

---

[7] [1952] A.C. 401; [1952] 1 T.L.R. 560; [1952] 1 All E.R. 531.

[8] [1928] A.C. 143, 154.

Mr. Heyworth Talbot was able to make some criticisms of the drafting of the relevant sections of the later Acts. But their general sense cannot be in question. Section 21 of the Act of 1923 (passed following the establishment of the Irish Free State) was directed, beyond question, to preserving for the limited period stated in the section (which period was extended by the material sections of the later Acts) to " bodies of persons or trusts " established in what had become the Irish Free State the benefit of the exemption conferred by section 37 of the Act of 1918. I quote the terms of section 21 of the Act of 1923 in full: " Subject " as hereinafter provided, section 37 of the Income Tax Act, 1918, " (which grants exemption in respect of charities), shall, in the " case of rents and profits of any lands, tenements, heredita- " ments or heritages belonging to any hospital, public school, or " almshouse in the Irish Free State, or vested in trustees in the " Irish Free State for charitable purposes, and in the case of a " body of persons or trust established in the Irish Free State " for charitable purposes only, and in the case of income which " according to rules or regulations established by Act of Parlia- " ment, charter, decree, deed of trust or will in the Irish Free " State, is applicable to charitable purposes only, or which, in " the names of trustees in the Irish Free State, is applicable " solely towards the repairs of any cathedral, college, church or " chapel, or any building used solely for the purpose of divine " worship, apply, as respects income tax chargeable for the year " 1923–24, as if the Irish Free State had not been constituted: " Provided that this section shall not apply except where the " lands, tenements, hereditaments, or heritages belonged to the " hospital, public school, or almshouse, or were vested in the trus- " tees, on the 5th day of April, 1923, or the interest, annuities, " dividends, shares of annuities, yearly interest or other annual

---

[8] [1928] A.C. 143, 154.

"payment arise from investments which were held by the body "of persons, trust, or trustees, or were subject to rules or regula- "tions as aforesaid, on the 5th day of April, 1923."

In my judgment, whatever be the defects in drafting, it cannot be open to reasonable doubt that Parliament, in enacting the section cited, proceeded upon the view of the interpretation of section 37 (1) (*b*) of the Act of 1918 for which the Crown contends. On any other view, the new enactment was otiose and futile. I add that, as appears from the terms of sections 37 (1) and 38 of the Finance Act, 1950, Parliament has since remained consistently faithful to its interpretation of section 37 of the Act of 1918.

Having come to the conclusion, for the reasons I have given, that the appeal fails upon the first point raised in the case stated, it is not strictly necessary for me to deal with the second, namely, the commissioners' finding that the activities of the foundation were and are "charitable" as that term is understood in English law. But, since the matter has been argued, it seems to be desirable that I should express my view upon it.

The facts are fully stated in the case and may briefly be recapitulated thus: The foundation was incorporated in the year 1946 in and according to the laws of the State of New York (in which State or elsewhere in the U.S.A. all its activities have always been conducted). It is a "membership corporation" within the meaning of the Membership Corporation Law of that State. By that law a membership corporation is defined, inter alia, as a "corporation not organized for pecuniary profit." By a later section of the same Act the purposes of such a corporation, if more than one, must be of a "kindred or incidental" character. So much is agreed. It is also not in dispute that, if by any part of its constitutional regulations such a corporation seeks to assume powers in excess of those permitted by the Membership Corporation Law, that part will be rejected as entirely ineffective. Similarly, it is agreed that if some later paragraph of its certificate of incorporation (which corresponds with the memorandum of association of an English limited company) contains a purpose going beyond, or not "kindred or incidental" to, the main purpose earlier stated in the certificate, the later paragraph will be also treated as futile or repugnant and regarded as non-existent.

In the circumstances, and having regard to the admissions made in argument on the part of the Crown, the sole question for determination is whether the Special Commissioners were entitled to find, as they did, that paragraph (*b*) of clause 2 of the foundation's certificate of incorporation must be rejected as purporting to confer a power in excess of, or not "kindred or "incidental" to, the purpose defined in paragraph (*a*) of the same clause.

Paragraph (*a*), so far as it is necessary to recite it, is as follows: "To advance the science of chemistry, chemical engin"eering and related sciences as a means of improving human "relations and circumstances throughout the world." The Crown has conceded throughout the present case, and I therefore assume for the purposes of this judgment, that the character of the purpose specified in this paragraph is such as would be held in our courts to be "charitable" by our law.

Paragraph (*b*) of clause 2 states: "To promote any other "scientific, educational or charitable purpose."

The Special Commissioners accepted the evidence of the expert legal witnesses called before them by the foundation (and there was no evidence to the contrary effect called by the Crown) that paragraph (*b*) being neither kindred nor incidental to paragraph (*a*) had to be wholly rejected; with the result that the foundation's purposes were to be discerned exclusively in paragraph (*a*).

The question posed, being one of foreign law, is prima facie a matter of fact for the final determination of the commissioners. The Crown has, however, concentrated its attack on the following passage in the case: "The purposes there stated are not of a "nature kindred or incidental to the primary purpose set out in "clause 2 (*a*). They are accordingly not authorized by section 10 "of the Membership Corporation Law and are void and to be "treated as surplusage. The use of the word 'other' negatives "the idea that the purposes in clause 2 (*b*) are of a nature kindred "or incidental to those set out in clause 2 (*a*). The 'other scien"'tific . . . purposes' referred to could comprise any branch of "science, e.g., medicine or anthropology, quite distinct from and "unrelated to 'the science of chemistry, chemical engineering "'and related sciences.' Moreover, 'other . . . educational or "'charitable purposes' are in no sense kindred or incidental to "the 'science of chemistry, chemical engineering and related "'sciences,' since they might well comprise purposes which had "nothing whatever to do with those sciences."

It was not contended that in this paragraph the commissioners were stating their own reasons for the conclusion at which they arrived. The Crown's argument was that, although the passage cited was an epitome or representation of the evidence given by the two New York lawyers called for the foundation, the evidence went beyond the proper scope and competence of expert testimony, being no more than the opinion of the witnesses upon the significance of the two common English words "kindred" and "incidental," which the court was free to reject and ought to reject.

I have been unable to accept this argument. Although it is true that "kindred" and "incidental" are words of ordinary usage in the English language, nevertheless, in the context in which they appear in the Membership Corporation Law, they have, or are at least capable of having in some degree, the characteristics of terms of art. I think, therefore, that it would be competent to a New York lawyer to state, as an expert, his opinion on the question how in the circumstances of the present case they would be construed by the Superior Courts of New York State; and I think that the passage I have cited must be taken to represent such an opinion on the part of the witnesses.

In my judgment, therefore, the commissioners were entitled to accept that view of the effect of the law of New York State and, as a matter of fact, to conclude as they did. I add that, in any event, the Crown appears, having regard to the concessions made on its behalf, to be upon the horns of a dilemma. Either paragraph (*b*) is kindred or incidental to paragraph (*a*) or it is not. If it is, then the "charitable" quality of the latter paragraph is not qualified or disabled by the former. If it is not, then (as the Crown agrees) paragraph (*b*) must be treated as struck out of the certificate. But, for the reasons which I have earlier stated, I think that the Crown is entitled to succeed on the first point and that the appeal must be dismissed accordingly.

JENKINS L.J. This is an appeal by the Camille and Henry Dreyfus Foundation Inc. (hereinafter called "the foundation"), a body incorporated in the State of New York in the United States of America as a membership corporation under the Membership Corporation Law of that State, from a judgment of Wynn-Parry J. dated February 18, 1954, dismissing the foundation's appeal by way of case stated from a decision of the Special Commissioners, to the effect that the foundation is not entitled to the exemption from income tax afforded to certain charitable institutions by section 37 (1) (*b*) of the Income Tax Act, 1918, and claimed by the foundation for the years 1946–47 to 1950–51 inclusive.

The income in question consisted of certain royalties payable by British Celanese Ld., a company resident in the United Kingdom, under certain agreements, the benefit of which was on

July 27, 1946, assigned by Dr. Camille Dreyfus to the foundation. This income was liable to income tax under Case III of Schedule D, and tax was duly deducted by British Celanese Ld. from the payments from time to time made to the foundation, the gross yearly amounts of which ranged from £51,792 in 1946–47 to £66,373 in 1950–51.

The income in question was by the express terms of the Act chargeable with the tax so deducted, notwithstanding that the foundation was a foreign corporation resident abroad, for paragraph 1 of Schedule D provides that " Tax under this Schedule " shall be charged in respect of—(*a*) The annual profits or gains " arising or accruing— . . . (iii) to any person, whether a British " subject or not, although not resident in the United Kingdom, " from any property whatever in the United Kingdom . . . ." That the foundation is for this purpose a " person " appears from rule 1 of the All Schedules Rules which provides that " Every " body of persons shall be chargeable to tax in like manner as " any person is chargeable under the provisions of this Act.", and from the definition of the expression " body of persons " in section 237 of the Act as " any body politic, corporate, or " collegiate, and any company, fraternity, fellowship and society " of persons, whether corporate or not corporate."

The foundation, however, contends that being a " body of " persons " within the meaning of the Act for the purposes of liability to tax under Case III of Schedule D, notwithstanding its foreign incorporation and residence, it should also be held to be a body of persons within the meaning of the Act for the purposes of the exemption from such tax afforded by section 37 (1) (*b*) of the Act, the further qualifications for exemption prescribed by the subsection, to the effect that it should be " established," and established " for charitable purposes only," being satisfied, as to the first, by its incorporation in the State of New York and, as to the second, by the purposes of its formation as defined by its certificate of incorporation, which are claimed to be " charitable " purposes only " within the meaning of the subsection.

I should next refer to the terms of section 37. The directly material provisions are those contained in subsection (1) (*b*), but in view of the course taken by the argument I had better read it in full. [His Lordship read the section, and continued:] For reasons which will presently appear, I should add that section 38 affords to the Trustees of the British Museum the like exemptions " as are granted to charitable institutions under this

"Act," while section 39 affords exemptions from tax to friendly societies, trade unions, savings banks, etc.

The objects of the foundation are set out in its certificate of incorporation. [His Lordship read the material provisions, and continued:] According to the evidence of two New York lawyers given before and accepted by the Special Commissioners, clause 2 (*b*) of the certificate of incorporation is under the relevant law of the State of New York void and of no effect, but this does not detract from the validity of the remaining provisions of the certificate, which are to be construed as though the certificate had never contained the offending clause 2 (*b*). There was some argument as to the adequacy and admissibility of this evidence, to which I will presently return.

The foundation has at all material times been resident outside the United Kingdom, that is to say, in the State of New York; and while under paragraph 4 of the certificate its operations, though principally to be conducted in the United States of America, are not limited to that territory, it has never in fact conducted any of its operations in the United Kingdom.

Pursuant to the provisions of section 19 (1) of the Finance Act, 1925, the foundation applied to the Inland Revenue Commissioners for exemption from tax under section 37 (1) (*b*) of the Act of 1918. The claim was refused by the Inland Revenue Commissioners, their reasons for such refusal being (a) that the foundation was not established in the United Kingdom and, accordingly, did not come within section 37; and (b) that the foundation was not established for charitable purposes only within the meaning of section 37.

The foundation thereupon appealed to the Special Commissioners under the provisions of section 19 (2) and (3) of the Act of 1925. The Special Commissioners likewise rejected the claim, expressing their decision thus: "1. There are two points "which require determination, viz., (*a*) whether the foundation "not being a body of persons established in the United Kingdom "is thereby precluded from relief under section 37; and (*b*) if "the foundation is not so precluded, whether it is a body of "persons established for charitable purposes only. 2. As regards "the first point, after a careful review of the arguments addressed "to us, we have come to the conclusion that we are bound by the "words of Lawrence J. in *Inland Revenue Commissioners* v. "*Gull*,[9] '. . . I feel constrained to hold that the exemption

---

[9] 21 T.C. 374, 378.

" 'applies only to the income of bodies of persons or trusts " 'established in the United Kingdom.' These words seem " to us an essential part of the ratio decidendi of that case and " not obiter dicta as was argued on behalf of the foundation. " We therefore dismiss the appeal. 3. If we are wrong as regards " the first point, we think that the foundation is a body of persons " established for charitable purposes only."

At the request of the foundation the Special Commissioners stated a case for the opinion of the High Court on the following questions of law: " (*a*) Whether the foundation, not being a body " of persons established in the United Kingdom, is thereby pre- " cluded from exemption from tax under the provisions of section " 37, Income Tax Act, 1918; and (*b*) if the foundation is not so " precluded, whether on the evidence set out in this case it is a " body of persons established for charitable purposes only within " the meaning of the said section 37."

The case came before Wynn-Parry J., who dismissed the appeal, holding that he should treat himself as bound to do so by the judgment of Lawrence J. in the case referred to by the Special Commissioners of *Inland Revenue Commissioners* v. *Gull.*[9] In that case Lawrence J., against his own inclination, felt himself " constrained " by the effect of the later enactments hereinafter mentioned " to hold that the exemption," i.e., the exemption afforded by section 37," applies only to the income of bodies or " trusts established in the United Kingdom "; and although he was able to decide in favour of the taxpayer, on the ground that the trust there in question was in fact established in the United Kingdom, so that it is arguable that the views he expressed as to the scope of section 37 were obiter, inasmuch as they did not provide the basis of his actual decision, it is, as Wynn-Parry J. pointed out, clear from the report that the matter was fully argued before him on lines closely resembling those followed by the arguments used in the present case.

The consideration, which Lawrence J. regarded as constraining him to construe section 37 as he did, was the legislative interpretation placed on section 37 by section 21 of the Finance Act, 1923, which provided for the exemption of charities in the Irish Free State in respect of income tax for the year 1923–4, and by section 32 of the Finance Act, 1924, and section 21 of the Finance Act, 1925, which respectively provided for a like exemption for the years 1924–5 and 1925–6, 1926–7 and 1927–8, and finally by the Finance Act, 1926, section 23, and Part II of the

---

[9] 21 T.C. 374, 378.

Second Schedule to that Act which provided under paragraph 3 of the latter that "section 21 of the Finance Act, 1925, which "grants an exemption for charities in the Irish Free State shall "cease to have effect." To appreciate the force of this consideration it is necessary to read at length section 21 of the Finance Act, 1923. [His Lordship read the section, and continued:]

It is clear that, for the purposes of this section and the subsequent legislation on the same topic, it was assumed that the exemption afforded by section 37 to bodies of persons or trusts established for charitable purposes only was limited to bodies of persons or trusts established in the United Kingdom, and that the secession of the Irish Free State from the United Kingdom would consequently have the effect of depriving bodies of persons or trusts established in the Irish Free state of the exemption in the absence of legislation continuing it in their favour.

We were referred to a number of authorities regarding the effect (if any) upon the construction of a given enactment of assumptions as to its meaning expressly or impliedly made in later legislation, not amounting to an amendment of the earlier enactment.

In *Ormond Investment Co. Ld.* v. *Betts*,[10] Lord Buckmaster cited with approval the following passage from the judgment of Lord Sterndale M.R. in *Cape Brandy Syndicate* v. *Inland Revenue Commissioners*[11]: " 'I think it is clearly established in " '*Attorney-General* v. *Clarkson*,[12] that subsequent legislation on " 'the same subject may be looked to in order to see what is the " 'proper construction to be put upon an earlier Act where that " 'earlier Act is ambiguous. I quite agree that subsequent legis" 'lation, if it proceed upon an erroneous construction of previous " 'legislation cannot alter that previous legislation; but if there be " 'any ambiguity in the earlier legislation then the subsequent " 'legislation may fix the proper interpretation which is to be put " 'upon the earlier.' "

Having cited this passage, Lord Buckmaster observed[13]: "This is, in my opinion, an accurate expression of the law, if by " 'any ambiguity' is meant a phrase fairly and equally open to "divers meanings, but in this case the difficulty is not due to "ambiguity but to the application of rules suitable for one purpose "to another for which they are wholly unfit."

In the same case Lord Atkinson said[13]: " Sargant L.J. seems

---

[10] [1928] A.C. 143, 154.

[11] [1921] 2 K.B. 403, 414; 37 T.L.R. 402.

[12] [1900] 1 Q.B. 156; 16 T.L.R. 51.

[13] [1928] A.C. 143, 156, 164.

"to hold that a legislative interpretation of the statute of 1918 "is to be found in this section 26 of the Act of 1924, and, "therefore, the case comes within a well recognized principle "dealing with the construction of statutes—namely, that where "the interpretation of a statute is obscure or ambiguous or readily "capable of more than one interpretation, light may be thrown "on the true view to be taken of it by the aim and provisions of "a subsequent statute. Many authorities have been cited by "Mr. Maugham on behalf of the appellants on this point. He "referred to Maxwell on Statutes. In *Dore* v. *Gray*,[14] it was "laid down that an Act of Parliament does not alter the law by "merely betraying an erroneous opinion of it; but where it is "gathered from a later Act that the legislature attached a certain "meaning to certain words in an earlier cognate Act this would "be taken as a legislative declaration of its meaning. In the "case of the *Earl of Shrewsbury* v. *Scott*,[15] Cockburn C.J. said: "'I quite concur in the argument that a mistake as to the state "'of the law on the part of the legislature in a private Act of "'Parliament—nay, I may say, upon the authority of the case "'of *Ex parte Lloyd*,[16] even in a public Act—and legislation "'founded on such mistake, would not have the effect of making "'that the law which the legislature had erroneously assumed to "'be so.' In *Attorney-General* v. *Wood*,[17] Vaughan Williams "J. in giving judgment is reported to have said: 'I wish to add "'that I do not think that the fact that section 14 of the Finance "'Act of 1896 contains an enactment in the sense of the con-"'struction which I am now putting on section 5 (3) of the Act "'of 1894 shows that that construction is wrong because, if it "'were right, the amending Act might be said to be useless. "'The amending Act may be merely declaratory to clear up "'doubts, and, even if not so intended, the presence of the "'section in the later Act cannot determine the construction of "'the earlier.'"

In *Inland Revenue Commissioners* v. *Dowdall, O'Mahoney & Co. Ld.*[18] Lord Reid said: "The question is therefore narrowed "down to this: Does paragraph 5 of the Schedule to the Act of "1939, reinforced by paragraph 8, contain or require the implica-"tion of an enactment that certain dominion taxes are to be "deductible in computing profits for United Kingdom excess "profits tax? I think that the question is a difficult one but I

---

[14] (1788) 2 T.R. 358.
[15] (1859) 6 C.B.N.S. 1, 180.
[16] (1851) 1 Sim.N.S. 248.
[17] [1897] 2 Q.B. 102, 110.
[18] [1952] A.C. 401, 421.

" have come to be of opinion that it does not. Paragraph 5 is " very misleading but to mislead a taxpayer is not the same thing " as to entitle him to relief. It may well be that these paragraphs show that Parliament was under a misapprehension as " to the existing law at the time, but it does not necessarily " follow that if Parliament had been correctly informed it would " have altered the law." In the same case Lord Radcliffe observed [19]: " The beliefs or assumptions of those who frame Acts " of Parliament cannot make the law."

In *Pemsel's* case [20] the question arose whether the general exemptions from income tax afforded to charities by sections 88 and 105 of the Income Tax Act, 1842, were impliedly confined to a narrower range of purposes than those included in the full legal definition of charity by the special exemption afforded by section 149 to the British Museum. It was argued for the Crown [21]: " The charitable purposes of the Income Tax Acts cannot be the " same as those of the statute of Elizabeth, because, there are " matters specifically dealt with by the Income Tax Acts which " certainly would have come within the terms of the statute of " Elizabeth. Section 149, 5 & 6 Vict. c. 35, makes a special " exemption in favour of the British Museum, whereas by a " decision given in the year 1826, *Trustees of British Museum* v. " *White*,[22] it had been settled that the British Museum is a " charity within the statute of Elizabeth."

This argument was thus dealt with by Lord Herschell [23]: " I " ought, perhaps, to notice the argument presented to your Lordships, that some more limited meaning of these words is " suggested by the provisions in connexion with which they are " found, and the specific exceptions contained in the statute. I " think that an argument derived from the specific mention of " certain subjects in the exemptions found in a taxing Act is of " little weight. Such specific exemptions are often introduced " ex majori cautela to quiet the fears of those whose interests are " engaged or sympathies aroused in favour of some particular " institution, and who are apprehensive that it may not be held to " fall within a general exemption."

In the present case, it was pointed out by Mr. Borneman, for the Crown, that the provisions in the Finance Acts of 1923, 1924 and 1925, in regard to the exemption of Irish charities, are to be construed as one with the Income Tax Act, 1918, and he referred us to the following passage from the speech of Lord Simon L.C. in *Penang and General Investment Trust Ld.* v. *Inland Revenue Commissioners* [24]: "The appellants, quoting "*Ormond Investment Co. Ld.* v. *Betts*,[25] are driven to contend "that this is an erroneous assumption made by the legislature "as to the previous state of the law—a contention particularly "difficult to sustain in a Finance Act which is to be read with "previous Finance Acts as a single code, but for the reasons "already given, the assumption is correct."

---

[19] [1952] A.C. 401, 426.
[20] [1891] A.C. 531.
[21] 3 T.C. 53, 57.
[22] (1826) 2 Sim. & S. 594.
[23] [1891] A.C. 531, 573, 574.

Having regard to the nature of the later enactments here in question, passed as they were to meet the peculiar situation created by the secession of the Irish Free State from the United Kingdom, and designed as they were to preserve, until such time as other arrangements were made, the exemption theretofore enjoyed by charitable institutions in that part of Ireland, I find it impossible to regard them as additions to or modifications of the income tax code which operated by way of necessary implication to restrict the application of the exemption provided for by section 37 (1) (*b*) to bodies and trusts established in the United Kingdom, if, apart from those enactments, the exemption was not upon its true construction so restricted. The framers of these enactments used language at least suggestive of a definite view that, upon the true construction of section 37, the exemption would be lost by charities in the Irish Free State unless expressly preserved.

If a definite view to that effect is rightly to be imputed to the legislature, then I think that the case would be within the principle stated by Lord Sterndale M.R. in the *Cape Brandy Syndicate* case [26] that "subsequent legislation, if it proceed upon an "erroneous construction of previous legislation, cannot alter that "previous legislation; but if there be any ambiguity in the earlier "legislation then the subsequent legislation may fix the proper "interpretation which is to be put upon the earlier." On the other hand, it is perhaps arguable that these enactments may have been the product of nothing more than a doubt as to how, in view of the secession of the Irish Free State from the United Kingdom, charitable institutions in that part of Ireland would stand as regards exemption from income tax, and were passed simply as ex abundanti cautela for the purpose of removing that doubt and preserving the status quo; and, if capable of being so explained, they could not be regarded as throwing any light on the construction of section 37. In my view, however, the former explanation is to be preferred to the latter, as I find it difficult to reconcile the proviso to section 21 of the Act of 1923, which limits its application to cases in which the property producing the income in question was held by the body of trustees concerned on April 5, 1923, or the language of the repeal contained in paragraph 3 of Part II of the Second Schedule to the Act of 1926—"Section 21 of the Finance Act, 1925, which grants an exemption "for charities in the Irish Free State shall cease to have effect" —with anything short of a positive assumption or belief that upon the true construction of section 37 of the Act of 1918 charities established in the Irish Free State were definitely not entitled to claim exemption under that section. Accordingly, I think that the enactments relating to Irish Free State charities, while not directly altering the construction or effect of section 37 of the Act of 1918, can properly be regarded as providing a legislative interpretation of section 37 to which recourse may legitimately be had for the purpose of resolving any ambiguity there may be in the construction of section 37 itself.

---

[24] [1943] A.C. 486, 496; 59 T.L.R. 237; [1943] 1 All E.R. 514; 25 T.C. 219.

[25] [1928] A.C. 143.

[26] [1921] 2 K.B. 403, 414.

Mr. Heyworth Talbot, for the foundation, contends that there is no such ambiguity, that the language of section 37 is, on the face of it, apt to include a body of persons established in any part of the world for charitable purposes only, and that there is no justification for reading into the plain terms of the enactment, in its application to bodies of persons, an implied restriction of its scope to bodies established in the United Kingdom. The main points of his argument may be thus summarized:—

(i) The expression "body of persons" is not a term of art, as is shown by the wide definition of that expression contained in section 237 of the Act of 1918, which contains nothing necessarily confining it to bodies constituted in the United Kingdom. Moreover, as appears from rule 1 of the All Schedules Rules, read in conjunction with paragraph 1 (*a*) (iii) of Schedule D, a foreign body of persons is a body of persons within the meaning of the Act for the purposes of the charge to tax under Case III of Schedule D.

(ii) Again, the word "established" is not a word of art. It means no more than "formed with some degree of permanence," and has, for instance, been held satisfied in the case of an unincorporated voluntary association (see *Inland Revenue Commissioners* v. *Yorkshire Agricultural Society*,[27] and in particular

---

[27] [1928] 1 K.B. 611, 628; 44 T.L.R. 59; 13 T.C. 58.

Atkin L.J.). There is no reason for holding that it is not satisfied in the case of a body, such as the foundation, incorporated under the law of a foreign State.

(iii) Admittedly the words " for charitable purposes only " must mean " exclusively for purposes which are recognized by the " law of the United Kingdom as charitable." But this presents no insuperable difficulty, although it necessarily involves in the case of a foreign body of persons a twofold inquiry, to ascertain first what the purposes of the body are according to the relevant local law, and, secondly, whether those purposes are charitable under the law of the United Kingdom. The fact that the purposes of the foreign body may be pursued wholly abroad is immaterial, provided that they are of such a character that a trust for their pursuit outside the United Kingdom would be recognized under the law of the United Kingdom as a charitable trust. It is well settled that " charitable purposes " under our law are not confined to charitable purposes within this realm. See *In re Robinson*,[28] which case also shows that our courts will give effect to a trust for charitable purposes to be carried out abroad, even where the trustee is a foreign person or institution outside the jurisdiction of those courts.

(iv) There is no room here for the application of the general principle of construction relied on by the Crown and deducible from such cases as *Jefferys* v. *Boosey*,[29] *Wallace* v. *Attorney-General*[30] and *Colquhoun* v. *Heddon*,[31] to the effect that general words in an Act of the United Kingdom Parliament, should, unless the Act expressly declares otherwise, be construed as referring only to persons, matters or things within the jurisdiction of that Parliament, and not as purporting to deal with persons, matters or things outside such jurisdiction; for section 37 is an exempting section, and its scope should therefore be regarded as limited and defined by reference to the incidence of the tax from which it provides exemption. If a foreign body suffers under the Act income tax of one of the kinds referred to in section 37, there can be no good reason for construing that section as excluding it from the exemption merely on the ground that it is a foreign body.

(v) The construction contended for on the part of the foundation not only gives literal effect to section 37 but produces a rational result, in that it makes the exemption coextensive with the liability to tax.

[28] [1931] 2 Ch. 122.

[29] 4 H.L.C. 815.

[30] (1865) L.R. 1 Ch. 1.

[31] (1890) 25 Q.B.D. 129.

I agree that the general principle deducible from, for example, *Colquhoun* v. *Heddon*,[31] cannot of itself provide any sufficient ground for limiting the exemption afforded by section 37 in the way contended for by the Crown. Where an Act of the United Kingdom Parliament imposes a tax on income arising in the United Kingdom, makes the tax equally exigible whether the person entitled to the income is British or foreign, resident or non-resident, and affords an exemption from the tax to persons fulfilling specified conditions which do not expressly include citizenship of or residence in the United Kingdom, there can, in my view, be no justification for the implied exclusion from the benefit of the exemption of a foreign non-resident who has suffered, or apart from the exemption would suffer, the tax, and who satisfies all the express requirements of the exempting provision, merely on the ground that he is a non-resident foreigner.

In the course of the argument I ventured to put the question whether, if section 37 had included a provision granting exemption from tax under Schedule D "to any blind person," the exemption could be claimed by a blind citizen of a foreign State not resident in the United Kingdom. I understood counsel for the Crown to concede that my imaginary exemption could be claimed by such foreign and non-resident blind person, but Mr. Stamp distinguished this hypothetical case from the case now before us, on the ground that the hypothetical condition of exemption, namely, blindness, involved a characteristic which could equally be possessed by persons of all nationalities and in all parts of the world; whereas the conditions of exemption prescribed by section 37, as it actually stands, involve characteristics which can only be possessed by institutions governed by the laws of the United Kingdom, and are peculiar to those laws. This shows, I think, that any territorial or jurisdictional restriction on the scope of section 37 must be found in the construction of the section itself, and the objects and conditions of the exemption which it confers, rather than in the application of the general restrictive principle to which I have referred.

There is, however, one reason underlying that principle which can, I think, properly be taken into account in reaching any conclusion on the construction of section 37, and that is the great administrative difficulty which must inevitably attend the world-wide application of the exemption. If any institution in any part of the world can lay claim to the exemption on the ground that it is established for exclusively charitable purposes, adjudication upon foreign claims for exemption will, as Mr. Talbot admits, involve the twofold process of ascertaining the relevant foreign law as to the purposes which the institution concerned is empowered to pursue and then determining whether those purposes, considered, I suppose, in relation to the manners, customs, beliefs and social conditions obtaining in the foreign country concerned, are charitable purposes within the meaning of our law. This would be liable to give rise in many cases to an abstruse and controversial inquiry, hardly to be answered short of litigation in the courts. The present case is relatively simple owing to the affinity of United States law to our own, but that is an accidental circumstance, which does not displace the possibility, or indeed probability, of acute difficulty in many other cases.

---

[31] 25 Q.B.D. 129.

The following passage from the judgment of Lord Cranworth L.C. in the succession duty case of *Wallace* v. *Attorney-General*[32] is not without relevance here: "By the second section of the Act "[16 & 17 Vict. c. 51] every disposition of property by reason "whereof any person shall on the death of another become "entitled to any property shall be deemed to confer on the person "so becoming entitled, a succession, and on that succession the "duty is imposed by section 10. The question, therefore, is "whether, where a person domiciled abroad makes a will giving "personal property in this country by way of legacy, the legatee "is a person becoming entitled to that property within the true "intent and meaning of the second section. I think not. I think "that in order to be brought within that section, he must be a "person who becomes entitled by virtue of the laws of this "country. Any wider construction would give rise to difficulties "hardly to be surmounted. In collecting the duties, the officers "of the revenue will in general find no difficulty, supposing the "duties to be imposed only on persons entitled under our own "laws. The officers know, or must be supposed to know, what "these laws are with respect to the persons liable by our laws "to the duties to be levied. But who the parties entitled under a "foreign will are, is a question which no knowledge of our laws "will enable them to solve. It can only be ascertained by "evidence in every case showing what the foreign law is and "who is entitled under it. In some cases this may admit of little "or no doubt, but in others it may be a matter of great difficulty,

---

[32] L.R. 1 Ch. 1, 7.

C. A.

1954

CAMILLE AND HENRY DREYFUS FOUNDATION INC. *v.* INLAND REVENUE COMMISSIONERS.

Jenkins L.J.

"and in no case can the officers safely act until the rights of "parties have been ascertained litigiously."

There is one other general consideration to which I should advert. Counsel for the Crown propounded the proposition that the reason for the exemption afforded to charities by section 37 was that the legislature thought fit to forgo the tax on income devoted to charitable purposes, because income spent on those purposes is spent for the benefit of the public, just as the tax is levied for the benefit of the public, so that the tax forgone goes to increase the benefit derived by the public from the furtherance of the charitable purpose. To this they added the further proposition that the relevant public for the purposes both of tax and of charity is the public in the United Kingdom, and invited the conclusion that the exemption afforded by section 37 should be held limited to charities benefiting the United Kingdom public, or in other words charities established in the United Kingdom.

I can give very little weight to this argument. It is, of course, axiomatic that no object is held charitable under our law unless it is for the benefit of the community, or, as is sometimes said, for the benefit of the public or a section of the public. One might expect that the community, or public or section thereof, some benefit to whom is held to be an essential ingredient in all charity, should be the community, or public or section thereof, existing in our own country, and not a foreign community or foreign public. But the authorities do not bear this out, for, as Mr. Talbot has shown, there are many instances in which purposes have been recognized as charitable notwithstanding that they were to be pursued wholly abroad. This appears from *In re Robinson*[33] and the cases there cited, and, indeed, an instance of it is provided by *Pemsel's* case[34] itself.

It does not necessarily follow that all purposes which, if carried out in, and for the benefit of the inhabitants of, the United Kingdom, would be charitable under our law, are recognized as charitable when carried out in, and for the benefit of the inhabitants of, a foreign country. Indeed, there are some which could not well be so recognized, for instance, a trust for the improvement of the efficiency of the army of a foreign State, or for the reduction of the national debt of a foreign State. I need not pause to consider which should and which should not be so recognized, or whether the element of public benefit in those which are so recognized should be looked on as consisting in the direct benefit provided for the foreign public concerned or in some secondary and indirect benefit in the shape (for instance) of moral improvement, assumed to be conferred on the public at home. It is here only necessary for me to observe that it cannot be maintained that no purpose is recognized as charitable under our law unless it is carried out in, and for the benefit of the public, or some section of the public, of the United Kingdom. This, I think, suffices to dispose of the general proposition I am now considering as an aid to the construction of section 37.

---

[33] [1931] 2 Ch. 122.

[34] [1891] A.C. 531.

Turning now to the language and context of the section itself, I observe, as to the context, that section 37 is the first of a fasciculus of three sections, of which the second provides exemption for a particular British institution, namely, the British Museum, while the third provides exemption for certain friendly societies, trade unions and savings banks, etc., the institutions referred to being unquestionably institutions forming and existing in, and under the laws of, the United Kingdom. Such being the context of the section as a whole, I observe further that the particular exemption here in question falls under the second of three heads of exemption for which the section provides. The first head (paragraph (*a*)) exempts "the rents and profits of "any lands . . . belonging to any hospital public school or alms-"house or vested in trustees for charitable purposes, so far as "the same are applied to charitable purposes only." I can hardly doubt that the hospitals, public schools or almshouses, to whose lands this exemption relates, are charitable institutions of those respective descriptions existing and legally recognized as such in the United Kingdom; and I think it is at all events plain that the trustees of lands vested to whom this exemption refers are trustees holding the land in question as trustees of charitable trusts taking effect and enforceable under the law of the United Kingdom, whether the purposes of such trusts are to be pursued in the United Kingdom or abroad.

The third head (paragraph (*c*)) exempts "any interest . . . "in the names of trustees applicable solely towards the repairs "of any cathedral, college, church or chapel or any building used "solely for the purposes of divine worship, so far as the same "are applied to those purposes." Here, too, I can hardly doubt that the buildings referred to are buildings of those respective descriptions in the United Kingdom, particularly having regard to the special meanings attached to the terms "cathedral" and "college" under our law; and I think it is at all events plain that the trustees, in whose names the "interest" etc., stands, must be trustees of a trust taking effect and enforceable under the law of the United Kingdom.

Coming last to the material head of exemption (paragraph (*b*)), I find it extends to any interest etc. "forming part "of the income of any body of persons or trust established for "charitable purposes only or which" (that is to say, which interest etc.) "according to the rules or regulations established "by Act of Parliament, charter, decree, deed of trust or will, "are applicable to charitable purposes only, and so far as the "same are applied to charitable purposes only." Ex concessis, "charitable purposes" in paragraph (*b*), as also in paragraph (*a*), means purposes which are charitable according to the law of the United Kingdom. "Act of Parliament" clearly means "Act of "the United Kingdom Parliament." "Charter" clearly means Royal Charter granted by the Sovereign of the United Kingdom. "Decree" clearly means "decree of a court of the United King"dom." As appears from what I have said regarding the references to "trustees" in the other two paragraphs, I think that "trust" and "deed of trust" in this paragraph must be taken as referring to trusts taking effect and enforceable under the law of the United Kingdom, and I think that similarly "will" must in the context mean a will so taking effect and enforceable.

Mr. Heyworth Talbot was, I think, disposed to concede all this, at all events to the extent of agreeing that the second branch of the exemption, introduced by the words "or which," could hardly be applied to an institution formed, resident and operating wholly outside the United Kingdom, governed by regulations deriving their validity wholly from the law of a foreign country, and in no way subject to the jurisdiction or control of our courts. But he submitted, nevertheless, that this did not destroy the claim of the foundation under the first branch of the exemption as a "body of persons . . . established for "charitable purposes only." His argument depended to some extent on splitting up the first branch of the exemption, ignoring the words "or trust"; taking the phrase "body of persons" and claiming that the foundation answered that description, then taking the word "established" and claiming that the foundation answered that description also; and finally taking the phrase "for charitable purposes only" and seeking to satisfy that condition by showing that the objects of the foundation, as defined in its certificate of incorporation, would, if contained in an English trust deed or memorandum of association, be held by our courts to be exclusively charitable objects. With respect, I think that this is a wrong method of approach.

The phrase to be construed is the whole phrase "body of "persons or trust established for charitable purposes only," and it must be construed in its context. Whether the claim for exemption is made on behalf of a body of persons or on behalf of a trust, the body or trust must be shown to be "established "for charitable purposes only," and that requirement must have the same quality in the case of a body of persons as it has in the case of a trust. I have already expressed the view that "trust" in an Act of the United Kingdom Parliament means a trust taking effect and enforceable under the law of the United Kingdom. It follows that, in my opinion, a "trust established "for charitable purposes only" must here mean a trust taking effect and enforceable under the law of the United Kingdom and creating an obligation enforceable in the courts of the United Kingdom to apply its funds for the purposes which are, according to the law of the United Kingdom, exclusively charitable. I can attribute no different meaning to the phrase "established "for charitable purposes only" when applied to a body of persons. So applied, I think it is only satisfied by a body of persons which is under the law of the United Kingdom subject to an obligation enforceable in our courts to apply its funds for purposes which are according to that law exclusively charitable. Accordingly, I would hold that the foundation is not "established "for charitable purposes only" within the meaning of section 37 (1) (*b*) of the Income Tax Act, 1918.

I am fortified in this conclusion by the consideration that an exemption substantially in this form has appeared in income tax legislation ever since 1799, at which date there was no question of taxing, and therefore none of exempting, non-resident foreigners. I also find some support for my view in the administrative difficulties attending the other construction, to which I have already adverted, and to which I might add the difficulty of ascertaining whether a foreign allegedly charitable institution is in fact applying its income in accordance with its avowed objects. Finally, if I have rated the case against the foundation too high, I think it can hardly be denied that the question is left at least in a state of ambiguity, which can properly be resolved by reference to the legislative interpretation placed on section 37 by the above-cited enactments concerning charities in the Irish Free State.

My conclusion on this part of the case makes it strictly unnecessary for me to express any view on the question whether the objects of the foundation, as expressed in its certificate of incorporation, are exclusively charitable purposes according to the law of the United Kingdom. As I understood, the charitable character of the foundation's object was only challenged on the part of the Crown with respect to clause 2 (*b*) of the certificate of incorporation. It was contended by counsel for the Crown that the object stated in clause 2 (*b*), "To promote any other scientific, educational or charitable purpose," was not necessarily or exclusively a charitable object. But the evidence of New York law, accepted by the Special Commissioners, was to the effect that this clause was void and should be ignored as mere surplusage. It was sought to surmount this evidence by saying that it was merely an expression of the opinion of the two New York lawyers who gave evidence on the matter. These witnesses deposed to the content of the New York Membership Corporation Law, and in particular section 10 of that law, which provides:—"five or more persons may become a membership corporation "for any lawful purpose, or for two or more such purposes of "a kindred or incidental nature, except a purpose for which a "corporation may be created under any general law other than "this chapter." Their evidence as to the effect of that provision was expressed in these terms:—"To be valid, therefore, all the "purposes of a corporation formed under the Membership Cor-"poration Law must be of a kindred and incidental nature."

They expressed the opinion that according to this test clause 2 (*b*) was void on the ground that the purposes stated therein were not of a nature kindred or incidental to the primary purpose set out in clause 2 (*a*). They added, however, that the certificate of incorporation, apart from the contents of clause 2 (*b*), which were void, was not otherwise affected and remained valid.

The Special Commissioners' finding on this part of the case was in these terms:—"The construction, meaning and effect "of the certificate of incorporation should, in our view, be deter-"mined by reference to the law of the State of New York. We "accept the evidence given before us that under the law of that "State the provisions of subparagraph (*b*) of paragraph 2 of the "certificate are void and inoperative, leaving the provisions of "subparagraphs (*a*) and (*c*) as the only operative parts of the "paragraph. The provisions of subparagraph (*c*) are machinery "provisions and the substantive purposes of the foundation are "accordingly to be found in subparagraph (*a*). There can be "no doubt, in our view, that the purposes there set out are "charitable purposes only according to English law."

It was urged on the part of the Crown that this finding should be rejected on the ground that the witnesses' evidence to the effect that the purposes stated in clause 2 (*b*) were not of a nature kindred or incidental to the primary purpose in clause 2 (*a*) was mere matter of opinion and not evidence of New York law. I cannot accept this objection. In my view it is well within the competence of a witness as to the operation of a given instrument under foreign law to state the content of the relevant law and to add his opinion as to the effect attributable under that law to the instrument in question. No doubt his opinion might be challenged or displaced by the contrary opinion of some other competent witness. But that is a matter of weight, not admissibility, and the Special Commissioners having accepted the uncontradicted evidence of the witnesses of New York law in the present case, I can see no reason for disturbing their finding. This cannot, however, affect the result; and answering as I do the first question in the case adversely to the foundation, I hold that this appeal fails and should be dismissed.

HODSON L.J. The question raised on this appeal is whether Camille and Henry Dreyfus Foundation Inc. is exempt from income tax. The foundation has been since the year 1946 in receipt of royalties from British Celanese Ld., a company resident in the United Kingdom, from which income tax has been deducted at source. The foundation claims under the provisions of section 37 (1) (*b*) of the Income Tax Act, 1918, as "a body "of persons . . . established for charitable purposes only" to recover the tax from the Inland Revenue Commissioners. The claim has been resisted on the ground that the foundation is not established for charitable purposes only within the meaning of section 37 and also on the ground that the foundation is not established in the United Kingdom and, accordingly, is not within the exemption whether or not it is a charity.

The Commissioners for Special Purposes decided in favour of the foundation that it was established for charitable purposes only, but decided against the foundation on the second point. In deciding the second point they followed the decision of Lawrence J. in *Inland Revenue Commissioners* v. *Gull*,[35] who in the course of his judgment had said: "I feel constrained to hold

---

[35] 21 T.C. 374, 378.

"that the exemption applies only to the income of bodies of "persons or trusts established in the United Kingdom." On appeal, Wynn-Parry J. arrived at the same conclusion, feeling, as I think rightly, that he should follow the direction of law which Lawrence J. had given after argument and full consideration upon the point, even though the conclusion at which Lawrence J. arrived in that particular case would have been the same had the direction been otherwise, for he upheld the finding of the commissioners that the trust in question was established in the United Kingdom.

Mr. Heyworth Talbot's argument is in essence a simple one. He says that the words used are "any body of persons" without geographical or other limitation, save that which is contained in the words "established for charitable purposes only." He relies on the general principle that the words must be taken as they stand with nothing added to them. He asks, with some force, why, in principle, his clients, if they are charities, should not be exonerated by the United Kingdom legislature in the same way as charities established in the United Kingdom are exonerated. It would, he says, be capricious for Parliament to act in an inconsistent manner when United Kingdom charities on the one hand and foreign charities on the other are concerned and he maintains that the plain words of the Act lead to no such capricious conclusion.

So far as *Gull's* case [35] is concerned, he relies on Lawrence J.'s decision in so far as the judge rejected many of the arguments then and now advanced by the Crown, but he says that the judge erred in feeling himself constrained by the language of what have been called the Irish Free State sections in later Income Tax Acts, to find in favour of the Crown on this point. These sections are section 21 of the Finance Act, 1923, section 32 of the Finance Act, 1924, and section 21 of the Finance Act, 1925, which confer exemption on the income of a "body of per-"sons or trust established in the Irish Free State for charitable "purposes only."

Mr. Talbot argued that these sections were either passed ex abundanti cautela or on an erroneous assumption as to the effect of section 37 of the Income Tax Act, 1918. Section 21 of the Finance Act, 1923, has been repealed by the Statute Law Revision Act, 1950, having ceased to have effect by virtue of paragraph 3 of Part II of the Second Schedule to the Finance Act, 1926.

---

[35] 21 T.C. 374, 378.

The presence of section 21 of the Act of 1923 cannot, in my opinion, be explained on the ground that it was inserted ex abundanti cautela, particularly having regard to the fact that it has now been repealed, having previously ceased to have effect as above stated. This treatment of the Irish Free State charities by the legislature is not consistent with an opinion held by Parliament that these charities were always within the scope of section 37 of the Act of 1918 and that the inclusion of Irish Free State charities in the later legislation can be explained in the same way as Lord Herschell dealt with the special exemption in favour of the British Museum contained in the Income Tax Act, 1842, when he said in *Pemsel's* case[36]: "Such specific exemptions are "often introduced ex majori cautela to quiet the fears of those "whose interests are engaged or sympathies aroused in favour "of some particular institution, and who are apprehensive that "it may not be held to fall within the general exemption."

Section 21 of the Act of 1923 must, I think, be taken as a legislative interpretation of section 37 of the Act of 1918, which can be used if the language of the latter is ambiguous. See *Ormond Investment Co. Ld.* v. *Betts*,[37] *per* Lord Buckmaster approving Lord Sterndale in the *Cape Brandy Syndicate* case.[38]

Mr. Heyworth Talbot argued that on the true construction of section 37 of the Income Tax Act, 1918, foreign charities were plainly within its scope and sought to dispose of the Irish Free State legislation by resort to the "erroneous assumption" argument which has found expression in a number of tax cases, including those last cited, and culminating in *Inland Revenue Commissioners* v. *Dowdall, O'Mahoney & Co. Ld.*[39] As to this argument a warning note was sounded by Lord Simon L.C. in *Penang and General Investment Trust Ld. and Ramsden* v. *Commissioners of Inland Revenue*,[40] where he said: "The "appellants, quoting *Ormond Investment Co. Ld.* v. *Betts*,[41] "are driven to contend that this is an erroneous assumption made "by the legislature as to the previous state of the law—a conten- "tion particularly difficult to sustain in a Finance Act which is "to be read with previous Finance Acts as a single code."

I find it impossible to say that the language employed in section 37 (1) (*b*) of the Act of 1918 so clearly carries the interpretation contended for by the foundation that the erroneous assumption argument ought to be entertained in this case. On the other hand, although I would follow the legislative interpretation to be found in the Irish Free State sections if there were a real ambiguity, I base my judgment on the interpretation of the section itself in its context against the background of its own history.

---

[36] [1891] A.C. 531, 574.

[37] [1928] A.C. 143, 156.

[38] [1921] 2 K.B. 403, 414.

[39] [1952] A.C. 401.

[40] [1943] A.C. 486, 496.

[41] [1928] A.C. 143.

Taking the phrase as a whole, that is to say "any body of "persons or trust established for charitable purposes only," the inclusion of the word "trust" denotes something characteristic of our law, and the expression "body of persons" should not be construed in isolation. When one looks at the following words, "Act of Parliament," "charter," "decree," "deed of trust" or "will," all of these, with the exception of "will," point to the law of the United Kingdom. "Act of Parliament" must mean Act of the Imperial Parliament; "charter" must mean charter of the United Kingdom; "decree" must mean decree of the courts of this country; and "deed of trust" must refer to a trust constituted and enforced by our law.

In my opinion, the language of the other parts of section 37, both those which precede and those which follow paragraph (*b*), lead to the same conclusion, as also do sections 38 and 39, part of the same group of sections brought together in the Act under the cross-heading "Relief to Charities, Friendly Societies, etc." The word "charity" itself has a special significance in English law and nothing in these sections points to foreign charities.

Sections 37, 38 and 39 are brought together in the Act of 1918, having been collected from the Income Tax Act of 1842 where they appeared in different parts of the Act. These provisions replace those contained in the Act of 1799, passed at a time when there was no question of either taxing or giving exemption to non-resident foreigners. Section 5 of this Act provided as follows:—"Provided also and be it further enacted, that no corporation, "fraternity or society of persons established for charitable purposes only, shall be chargeable under this Act, in respect of the "income of the corporation, fraternity or society."

As I indicated above, I rest my judgment on the interpretation of the section in its context and against its historical background, but I find some support for the conclusions which I have reached in the practical difficulties involved in the contrary view. The Commissioners of Inland Revenue would, indeed, be set a difficult task if they had to apply the law of any part of the civilized world in order to ascertain the purposes for which a particular body of persons was established before applying the law of this country as to whether those purposes were charitable

C. A.

1954

CAMILLE AND HENRY DREYFUS FOUNDATION INC. *v.* INLAND REVENUE COMMISSIONERS.

within the meaning of our law. Again, the difficulty of insisting on proof that income had been applied for charitable purposes only would be great. The observations of Lord Cranworth L.C. in *Wallace* v. *Attorney-General*,[42] cited by Jenkins L.J., are, I think, relevant in this connexion.

I agree, therefore, that the appeal fails, although, for the reasons given by the other members of the court, I am of opinion that the finding of the Special Commissioners that the objects of the foundation are exclusively "charitable" as understood by our law is not assailable.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors: *Linklaters & Paines; Solicitor of Inland Revenue.*

B. A. B.

---

[42] L.R. 1 Ch. 1, 7.

SHARKEY (INSPECTOR OF TAXES) *v.* WERNHER.

C. A.

1954
July 5, 6, 7.

Evershed M.R., Jenkins and Hodson L.JJ.

Revenue—Income tax—Two trades—Stud farm—Trade under Schedule D — Racing stables — Recreational and not taxable — Transfer of horses from farm to stables—Value attributable to transferred horses in stud farm accounts.

The taxpayer's wife carried on the activities of a stud farm, which were admitted to be "husbandry" and taxable under Schedule D. She also carried on as a separate activity racing stables which gave rise to no liability to tax, being a "recreational" enterprise. Horses were bred at the stud farm for the racing stables. On the transfer of five horses in the relevant year of assessment from the stud to the stables:—

Held, that the amount to be credited in the stud farm accounts on the transfer of the horses was the cost of breeding the horses and not their market value. For taxation purposes what was in reality a single entity had to be divided into two parts, but in dealing with assets transferred from one part to the other, a real figure must be brought into account. There had been no sale of the horses, no profit had been realized on the transfer, and there was no justification for imputing a notional sale at a profit for purposes of taxation.

Laycock v. *Freeman, Hardy and Willis Ld.* [1939] 2 K.B. 1; 55 T.L.R. 218; [1938] 4 All E.R. 609; 22 T.C. 288, and *Briton Ferry*

C. A.

1954

SHARKEY
v.
WERNHER.

Steel Co. Ld. v. *Barry* [1940] 1 K.B. 463; 56 T.L.R. 248; [1939] 4 All E.R. 541; 23 T.C. 414 applied.

Watson Bros. v. *Hornby* (1942) 24 T.C. 506; 168 L.T. 109; [1942] 2 All E.R. 506 overruled.

Decision of Vaisey J. [1953] Ch. 782; [1953] 2 All E.R. 791 reversed.

APPEAL from Vaisey J.[1]

The respondent taxpayer, Sir Harold Wernher, appealed from the decision of Vaisey J. allowing an appeal by the Crown by case stated by the Commissioners for the Special Purposes of the Income Tax Acts, who had discharged an assessment to income tax in the estimated sum of £5,000 for the year 1949/50 on the respondent. The assessment was made in respect of the profits of the respondent's wife, Lady Zia Wernher, arising from a stud farm known as Someries, Newmarket. For the purposes of the appeal it was admitted that the enterprise carried on by Lady Zia at the farm was "husbandry," which, by virtue of section 10 of the Finance Act, 1941, section 28 of the Finance Act, 1942, and section 31 of the Finance Act, 1948, was to be treated as the carrying on of a trade, the profits of which were charged to tax under Case I of Schedule D.[2] Lady Zia also carried on separately a racing stables. It was agreed that the racing enterprise was purely recreational and, therefore, that she was not taxable in respect of any profits or gains which she might make thereout.

Lady Zia bred horses at her stud farm, some of which she sold. She gave several of the animals to her daughter and others she transferred from the stud farm to the stables to be trained and used for racing. It was agreed that the horses sent to the stables were to be treated as having left the farm as completely and effectually for all purposes as if they had been sold, died or been destroyed, and no question was raised on the appeal as to what the position might be for tax purposes if any of them had been, or were thereafter, sold or transferred or moved back to the stud farm. In the relevant year five colts and fillies were transferred by Lady Zia from the stud farm to the racing stables. The question was what sum ought to be brought into the accounts of the stud farm consequent on the transfer of the five horses.

---

[1] [1953] Ch. 782; [1953] 2 All E.R. 791.

[2] Income Tax Act, 1918, Sch. D, para. 1: : "Tax under this schedule "shall be charged in respect of— "(*a*) The annual profits or gains "arising or accruing . . . (ii) to any "person residing in the United Kingdom from any trade, profession, "employment, or vocation."

Para. 2: "Tax under this schedule "shall be charged under the following "cases respectively; that is to say,— "Case I—Tax in respect of any trade "not contained in any other "schedule."

The respondent contended that the proper figure to bring into the accounts (and which had in fact been brought in) was the cost of breeding the transferred horses. Thus, in the "horse account" there was shown on the left-hand side the various animals by name: stallions, brood mares and young stock, which formed the stock of the stud farm at the beginning of the year covered by the accounts. Against the first item, the stallion "Precipitation," there was the figure of £40,000, representing the value of the stallion at the beginning of the year. The five colts and fillies in question appeared under the heading "Yearlings," together with others. For example, at the beginning of the account a figure of £572 12s. was shown against a chestnut colt by "Hyperion" out of "Doubleton," representing the cost to Lady Zia of that colt until January 1, 1948. At the end of the account on the left-hand side reference was made to animals bred during the year, but as they did not exist at the beginning of the year no figure was given for them.

At the right-hand side of the account there was shown the animals in existence and forming the stock at the close of the accounting period. "Precipitation" was there shown at the reduced figure of £30,000, reflecting that it was ageing. The five colts and fillies in question were shown under the heading "Animals transferred to training," and the chestnut colt taken as an example above, by "Hyperion" out of "Doubleton," was listed at £692, the difference between that and the former figure representing the added cost of expenditure on the animal from January 1, until it was moved from the stud farm. The market value of the colt was also given in the account (£3,900).

The total of the figures on the right-hand side of the account, that is, the value of the stock at the close of the period, was less than that of the corresponding figures at the beginning of the period, by £16,373. That balance figure was then brought into the profit and loss account, which consisted of two parts: the first part, shown on the left-hand side, consisted of the various items of expenditure on the horses, such as wages, forage, horse keep, veterinary charges and so forth, and also rates, telephone and the usual expenses of any industry or enterprise. On the right-hand side of the account the main item was the service fees of the stallions, particularly the stallion "Precipitation"; for in addition to breeding horses, the stallions were made use of by serving mares belonging to other owners, for which services fees were received. In the year in question

"Precipitation" earned £15,540. The service fees and other receipts exceeded the wages, upkeep and so forth, by £4,851; but when the adverse balance on the horse account and certain other items, such as "reserve for taxation," was brought in there was for the year in question an adverse balance of £10,423, which was transferred to capital account.

If, however, the market value of the horses transferred had been substituted for the cost figures on the right-hand side of the horse account, the adverse balance on the horse account would have been reduced by approximately £7,000, and the adverse balance on the profit and loss account would likewise have been reduced by approximately that amount. The Crown contended that that was the proper method of dealing with the transferred animals, that they should be shown in the accounts at the market value, that is at the price which they would have fetched on an assumed notional sale.

The commissioners held that the cost of breeding was the correct figure, and, accordingly, they discharged the assessment on the estimated market value of the horses. On appeal by the Crown, Vaisey J. reversed the commissioners and held that the market value was the amount to be credited. The taxpayer appealed.

Leslie Graham Dixon Q.C., *John Senter Q.C.* and *Peter Rowland* for the taxpayer. The profits of the stud farm which are assessable under Case I of Schedule D are the actual profits or gains "arising or accruing" from the actual trading carried on, not notional profits or gains. The horses which Lady Zia transferred to her racing stables should be brought into the stud farm accounts at the sum which they cost Lady Zia to breed them. *Watson Bros.* v. *Hornby* [3] is distinguishable from the present case; both activities in that case were taxable, though only the poultry farm was husbandry, whereas in the present case the racing stables are regarded as recreational and are not liable to tax. In *Watson Bros.* v. *Hornby* [3] it was submitted on behalf of the Crown that the cost price of the transferred assets was the correct figure to bring into the accounts (the cost figure there being higher than the market value since the asset-producing business, the hatchery, was operating at a loss). That contention was unsuccessful, but it is submitted that it was correct.

[*Sir Reginald Manningham-Buller Q.C.*, *S.-G.*, intervening. On further reflection the argument there submitted on behalf of the Crown was wrong; it is significant that no appeal was brought.]

---

[3] (1942) 24 T.C. 506; 168 L.T. 109; [1942] 2 All E.R. 506.

It was assumed in *Watson Bros.* v. *Hornby*[3] that because the transferee was a trader the transfer must be in the course of trade—that it was a realization of stock in course of trade. That imported a notional sale and the price was then fixed by reference to the Sale of Goods Act, 1893. But that assumption is inconsistent with the passage in *Laycock* v. *Freeman, Hardy & Willis Ld.*,[4] where Sir Wilfrid Greene M.R. said that it was not permissible by assuming a notional sale to attribute to the trader a profit which he had not in fact made, and with Sir Wilfrid Greene's statement of principle in *Briton Ferry Steel Co. Ld.* v. *Barry*.[5] So far as the reports of *Watson Bros.* v. *Hornby*[6] show, neither of those cases was cited to Macnaghten J.

In *Inland Revenue Commissioners* v. *William Ransom & Son Ld.*[7] the court relied on a memorandum kept by the factory manager in which the assets in question were shown as having been transferred on the basis of market value. The figures were, however, taken as agreed in that case and it was not argued whether the manager had kept the accounts in his memorandum correctly. It is submitted that Sankey J. was wrong in describing the transfer as a "sale."

A trader can sell his stock at whatever price he chooses; he is not obliged to make the utmost profit, nor will he be assessed to tax on the profit which he might have made if he sells at less than the full market value, nor, as Palles C.B. said in *Dublin Corporation* v. *M'Adam (Surveyor of Taxes)*,[8] can a man trade with himself. There are special statutory exceptions to that general rule: see section 21 of the Finance Act, 1922, section 26 of the Finance Act, 1938, and section 37 of the Finance Act, 1951, but these only make taxable what would otherwise have been exempt from taxation and so emphasize the general rule. Subject to express statutory exceptions a trader is, as Lord Halsbury said in *Gresham Life Assurance Society* v. *Styles*,[9] taxed on his profits in the natural and proper sense, and as Lord Clyde said in *Glenboig Union Fireclay Co. Ld.* v. *Inland Revenue Commissioners*,[10] on his actual, not his hypothetical profits.

---

[3] 24 T.C. 506.

[4] [1939] 2 K.B. 1; 55 T.L.R. 218; [1938] 4 All E.R. 609; 22 T.C. 288.

[5] [1940] 1 K.B. 463; 56 T.L.R. 248; [1939] 4 All E.R. 541; 23 T.C. 414.

[6] 24 T.C. 506; 168 L.T. 109; [1942] 2 All E.R. 506.

[7] (1918) 12 T.C. 21.

[8] (1887) 2 T.C. 387, 397.

[9] [1892] A.C. 309; 8 T.L.R. 618; 3 T.C. 185, 188.

[10] (1922) 12 T.C. 427.

There is here no question of having to dissect activities which are taxable under different heads, and the case is to be treated on the same footing as one in which a trader or farmer uses his own products in his home, or gives away some of his produce. The accounts must in such circumstances be credited with the cost of the produce, not because the producer has "received" that amount, but to ensure that his profits and gains are correctly assessed. A trader is not assessed on appreciation, or depreciation of his stock. If, for example, a picture dealer buys a picture worth £10 and it subsequently becomes worth £10,000 whilst still in his hands, it may be brought into his accounts at cost, for he is not taxed on unrealized profits. If when he bought it he had taken it to his own home and then had subsequently sold it at the much higher price, it would have been a question of fact whether the picture had remained part of his stock-in-trade or not. For the purpose of this case the horses are to be treated as though they had gone permanently. It is not known whether they will ever come back.

Sir Reginald Manningham-Buller Q.C., S.-G. and *Sir Reginald Hills* for the Crown. To get an accurate profit and loss account of the taxable activity carried on at the stud farm, the proper figure to insert into the horse account in respect of the five horses transferred to the racing stables is the market value at the time of transfer, whether it is higher or lower than the cost price. If, for example, Lady Zia bought a horse for racing and transferred it to the stud farm, the horse should be brought into the stud farm accounts at the market value when transferred, and if it had depreciated in value whilst at the racing stables it should be brought into the accounts at a figure below the original cost. If a horse is sold from the farm the receipts are credited with the full amount and the horse account is reduced by that amount. These five horses were taken out for recreational purposes, but unless the accounts are credited with their value, the accounts will be misleading. Unlike the examples given by way of analogy by Mr. Graham Dixon, the assets transferred represented the major part of the produce of the stud farm. One of the main objects of the farm was to produce yearlings for the racing stables. Between 1944 and 1948 11 out of 16 foals bred at the farm were so taken. It is not suggested, of course, that Lady Zia ought to run the farm wholly with a view to making a profit, but it is essential to get a realistic picture of the profits of the farm, and the cost of the yearlings may bear no relation to their true value.

In fact, the more successful the stud farm is, the greater will be the disparity between the cost and the value at the time of transfer and, consequently, the greater will be the loss to the stud farm each time a yearling is transferred instead of being sold if the contention of the taxpayer is accepted.

In cases where the amount taken away from the taxable activity for the producer's own consumption or given away by him is small in relation to the whole, the cost price may sometimes be inserted for convenience. Sometimes, too, the cost price may afford a feasible method of estimating the market value, particularly where the stock taken out would normally be sold in the form in which it was brought in without further processing; but strictly speaking, farm produce taken for personal use must be credited at market value. In *Inland Revenue Commissioners* v. *William Ransom & Son Ld.*[11] the market value was taken as the appropriate figure, and it was not suggested that that involved implying a notional sale from the trader to himself. That case was not referred to in *Laycock* v. *Freeman, Hardy & Willis Ld.*,[12] which was not dealing with the same problem. The question there was whether there had been succession to a trade, and there is no ground for supposing that Sir Wilfrid Greene M.R. had his attention drawn to the present different problem, and he said nothing which supports the submission made on behalf of the taxpayer here. *Briton Ferry Steel Co. Ld.* v. *Barry* [13] was another "succession" case, in which Sir Wilfrid Greene M.R. did deal with notional sale, but only in relation to the issue before him. He concluded [14] that the starting figure (that is, the cost price) should be brought in for the purpose of ascertaining profits of the "end activity" where there had been a succession to the trade, but the present case is not concerned with the profits of the "end "activity," that is, the racing stables. The question here is how to get a correct picture of the stud farm accounts. It is not, of course, suggested that *Laycock* v. *Freeman, Hardy & Willis Ld.*[15] and *Briton Ferry Steel Co. Ld.* v. *Barry* [16] were wrongly decided, but they are distinguishable. They were not cited in *Watson Bros.* v. *Hornby*,[17] which is indistinguishable from the present case, was binding on Vaisey J., and was rightly decided.

L. Graham Dixon Q.C. replied.

---

[11] 12 T.C. 21.
[12] [1939] 2 K.B. 1.
[13] [1940] 1 K.B. 463.
[14] Ibid. 484.
[15] [1939] 2 K.B. 1.
[16] [1940] 1 K.B. 463.
[17] 24 T.C. 506.

EVERSHED M.R. The question relates to the liability of the taxpayer, Sir Harold Wernher, for income tax for the year 1949–50 in respect of a stud farm carried on by his wife, Lady Zia Wernher. The matter does not depend upon any finding of fact by the Special Commissioners. The short question of law is what figure in the accounts of the farm for the year in question, which are assumed to be the basis of assessment, should be set against certain colts and fillies transferred or moved during the year out of and away from the stud farm for Lady Zia's own racing purposes. Should it be the figure which represents the cost of these animals up to the date of their movement? Or should it be their market value, that is to say, the sum which they would have fetched if sold in the ordinary course on the date of transfer? The Special Commissioners were of opinion that the former was the proper figure. Vaisey J., regarding himself as bound by *Watson Bros.* v. *Hornby*,[1] concluded for the latter view.

[His Lordship stated the facts, and continued:] It will be seen that Lady Zia, at all relevant dates, was pursuing two distinct activities, both concerned with racehorses, first, the taxable business of the stud farm, and, second, the non-taxable activity of racing horses. The question which the court has to decide concerns the movement of an item of property or stock from the scope of one activity to the scope of another.

The five colts and fillies were part of the farm stock at the beginning of the period covered by the account. They had been bred, not bought, and the breeding of such horses was a principal object of the farm. They had been brought into the horse account at figures representing their cost up to the beginning of the accounting period. Having been moved out of the stock before the end of the accounting year some corresponding figure, admittedly, has to be placed on the right-hand side of the appropriate account; and the question is whether that figure should be the cost of the horses up to the date of removal or their market value.

The Crown submitted that as the stud farm is a business, which is carried on substantially to provide Lady Zia with racehorses, so, in order to form a realistic view of the result of the business carried on, the relevant figure should be the true value of the stock produced and disposed of, that is to say, the market value. The Solicitor-General denies that he is seeking to introduce an imaginary sale. He says that this is a matter of properly valuing the animals, and that their proper and true value is their market value.

---

[1] (1942) 24 T.C. 506; 168 L.T. 109; [1942] 2 All E.R. 506.

On the other hand, Mr. Graham Dixon submits that whatever the true value of these young horses might have been, that value was not realized in fact, any more than it would have been realized if Lady Zia had given the animals to her daughter or to some third party. The animals were and remained the property of Lady Zia and were subject to her control at all relevant dates before and after removal from the farm. To take one of the many examples cited to the court, a professional grower of roses might plant one of his own roses for his own enjoyment in his own garden. In those circumstances, the taxpayer submits that to include the market value of the rose in the rose-growing accounts would be to suppose that which never occurred, and to create a non-existent item of receipt solely for the purpose of taxation.

If this matter were res integra, I think that, as a matter of common sense, there would be much to be said for the Solicitor-General's view that the value put on these animals for the purpose of this horse account should be what they are in fact worth. But this matter is not res integra, and after considering the authorities which expound the general principle to be applied, my view is that we should decide this matter in favour of the taxpayer.

Vaisey J. took the view that he was bound by the decision in *Watson Bros.* v. *Hornby.*[1] In his judgment he said[2]: "My "decision in this case is based on the fact that it is, in my "judgment, indistinguishable in principle from an earlier decision, "namely, that of Macnaghten J. in *Watson Bros.* v. *Hornby.*[3] ". . . Mr. Grant, for the respondent, now admits this, but con-"tends that case ought not to be followed on the grounds that it "was plainly wrong, and that it was irreconcilable with the "decisions of the Court of Appeal in *Laycock* v. *Freeman, Hardy "& Willis Ld.*,[4] and *Briton Ferry Steel Co. Ld.* v. *Barry.*[5] I am "not altogether satisfied on either point, but taking the second "one first, it seems to me that the statements upon which "Mr. Grant relies in the two Court of Appeal cases (to which "I will refer in a moment) ought not necessarily to be treated as "axiomatic, but rather as being of general though not universal

---

[1] 24 T.C. 506.

[2] [1953] Ch. 782, 784.

[3] 24 T.C. 506.

[4] [1939] 2 K.B. 1; 55 T.L.R. 218; [1938] 4 All E.R. 609; 22 T.C. 288.

[5] [1940] 1 K.B. 463; 56 T.L.R. 248; [1939] 4 All E.R. 541; 23 T.C. 414.

"application. Those two cases both dealt with the question of "succession to discontinued businesses; and there is no doubt "that the judgments in each case were based on the general "principle that it is not legitimate to charge a man with the "notional profits of a notional sale made or assumed to be made "by himself to himself." Vaisey J. then referred to *Briton Ferry Steel Co. Ld.* v. *Barry*[5] and to *Watson Bros.* v. *Hornby*.[6] He rejected the alleged distinction between the present case and that of *Watson Bros.* v. *Hornby*,[6] and concluded[7]: "The "justification for departing in the case of *Watson Bros.* v. "*Hornby*[8] from the general principle that a man cannot trade "with himself, buy from himself, sell to himself, and make "notional profits out of himself, was obviously this: that the "Income Tax Act itself had, by splitting the personality of the "taxpayer, and putting the two parts of him into different "schedules, made such a notional dichotomy inevitable. If that "is the explanation, I cannot see why a similar consequence "should not follow from the splitting of Lady Zia's activities "between farming which is taxable and racing which is not. I "am by no means convinced that *Watson Bros.* v. *Hornby*[8] was "wrongly decided, and I think that it is my duty to follow it."

I shall, therefore, first turn to *Watson Bros.* v. *Hornby*,[8] for I agree with Vaisey J. that the present case is indistinguishable from it. It is, therefore, necessary for the court to express a view whether *Watson Bros.* v. *Hornby*[8] was rightly decided—whether it was in accordance with the principle, as that principle was expounded in the Court of Appeal cases referred to by Vaisey J., and particularly in the more recent of them, *Briton Ferry Steel Co. Ld.* v. *Barry*.[9] In *Watson Bros.* v. *Hornby*[10] the taxpayer was carrying on two enterprises, one of which fell to be taxed under Schedule B and the other under Schedule D. The Schedule B enterprise was that of a poultry farm and the Schedule D enterprise that of a hatchery. No less than 900,000 chicks were hatched during a year in the hatchery, but the trade was such that, at the date in question, the cost of hatching these chicks for the most part greatly exceeded their market value, the market value of a day-old chick being 4d., and the cost of its production 7d. The taxpayer chose to transfer some chicks from his hatchery to his own farm for brood purposes, and the question was whether he had to credit himself in his accounts for the purposes of his hatchery business with the market value of 4d., or the cost figure of 7d. for each chick transferred. To make the parallel with the present case clear, it is as though the day-old chicks transferred from the hatchery were the fillies and colts transferred from the stud farm.

---

[5] [1940] 1 K.B. 463.
[6] 24 T.C. 506.
[7] [1953] Ch. 782, 786.
[8] 24 T.C. 506.
[9] [1940] 1 K.B. 463.
[10] 24 T.C. 506.

It was contended by the Crown that the proper sum to be put in, as representing the chicks transferred to the farm, was the cost figure of 7d. per chick, and not the market value of 4d. It was contended that the hatchery and the farm were two activities of the same person. He could not trade with himself or make a loss by transferring from one department to another. The credit of 4d. was, in effect, a writing-off of the unrealized loss of 3d. per chick, which could be arrived at only by treating the taxpayer as trading with himself and by writing off a loss not actually incurred. The correct valuation was, therefore, 7d., the admitted cost of production. It will be seen that, if the Crown's argument was correct, the putting of 7d. into the right-hand side of the hatchery account very substantially decreased the loss of the hatchery business, or increased its profits, as the case may be.

The taxpayer, however, succeeded, Macnaghten J. holding that in that case the proper sum to be placed in the account, as representing the value of each chick transferred, was the market value of 4d. The matter was expressed by Macnaghten J. in the following terms [11]: " The question now before the court is: What " is the price at which the chicks should be deemed to have been " bought by the farm from the hatchery? The appellants are the " proprietors of both the hatchery and the farm and it is said " that a person cannot trade with himself. That, no doubt, is " quite true; but for the present purpose it is, I think, necessary " to regard the hatchery and the farm as separate entities. Where " one person buys goods from another but the contract of sale " does not specify the price to be paid, the contract is, nevertheless, valid and enforceable. The law provided that the " purchaser must pay a reasonable price." As Macnaghten J. pointed out, the " reasonable price " is now determined by applying section 8 of the Sale of Goods Act, 1893. I confess that there seems to me to be a certain unreality in introducing the Sale of Goods Act in a matter concerning the notional sale by a man to himself; and the Solicitor-General has made it plain in the present case that he is not saying that there was a notional sale. The question, however, is whether, on his analysis, he can avoid saying that. Whatever may be the argument here, it is not in doubt that Macnaghten J. decided *Watson Bros.* v. *Hornby* [12] on the footing that he must treat the taxpayer as having sold from himself as a hatchery owner, to himself as a farmer.

---

[11] 24 T.C. 506, 509.

It will be noted that in *Watson Bros.* v. *Hornby*,[12] as in the present case, there were two enterprises or activities. It is true that in that case both enterprises were liable to be taxed, though they were taxable under different schedules. But, as the Solicitor-General has accepted, it is not relevant or conclusive that the enterprises or activities, if there are more than one, should be taxable. In *Watson Bros.* v. *Hornby*,[12] as in the present case, the question was at what figure an item of property belonging to the owner of both enterprises should be entered in the accounts when it was transferred from one to the other.

One other matter must be noted. So far as the report shows, the two Court of Appeal cases (*Laycock* v. *Freeman, Hardy & Willis Ld.*[13] and *Briton Ferry Steel Co. Ld.* v. *Barry* [14]) were not cited to Macnaghten J., though it would appear to be plain that the argument submitted on behalf of the Crown, which I have read, would have been substantially supported by a citation of the latter of those cases at least. It is, however, now said by the Solicitor-General that the argument put forward on behalf of the Crown in *Watson Bros.* v. *Hornby* [15] is no longer accepted by the Crown as correct. The argument of the Crown in the present case necessarily involves a denial of the correctness of their earlier argument.

Before I pass to the two Court of Appeal cases I should make a brief reference to *Inland Revenue Commissioners* v. *William Ransom & Son Ld.*,[16] which, in some respects, undoubtedly is closely analogous to the present case. The taxpayer carried on the activities of a herb-grower and a manufacturer of chemicals from those herbs. He had been taxed in respect of these activities without distinguishing between them, that is, on the footing that they all formed part of a single business enterprise. The taxpayer claimed successfully that the two parts of his enterprise should be treated as distinct. His point in so claiming was that the herb-growing activities, being a kind of husbandry, did not attract excess profits duty. As incident to the decision of the case, memoranda were produced in which had been recorded the market values or prices of the herbs transferred from the herb-growing part of the taxpayer's enterprises to the factory. It was, therefore, suggested before us that the facts in *Ransom's* case[16] supported the view that the market value, or, in other words, the true value in a commercial sense, was the right value for accounting purposes to enter for assets transferred from one kind of a taxpayer's activities to another.

---

[12] 24 T.C. 506.
[13] [1939] 2 K.B. 1.
[14] [1940] 1 K.B. 463.
[15] 24 T.C. 506.
[16] (1918) 12 T.C. 21.

In my judgment, *Ransom's* case[16] does not really provide any authority for the submission now based on it, because the question of the right amount was never in issue. It was never debated; indeed, Lord Sankey said in his judgment[17]: " Upon the other " side of the account there is set out the stocks in hand on " December 31, together with three other items, the first of " which is the produce which is sold to the factory amounting " to £276; the second is produce sold generally to the public. . . ." That, I think, shows that the matter can never have been really debated or considered, because there never was any sale from the farm to the chemical factory; and, as I have more than once stated, the Solicitor-General is not here contending that there was any sale of these colts and fillies by Lady Zia to herself.

Mr. Graham Dixon relied upon a number of passages from the judgment of Sir Wilfrid Greene M.R. in the earlier of the two Court of Appeal cases, *Laycock* v. *Freeman, Hardy & Willis Ld.*,[18] as expounding the general principle on which he founds his argument, namely, that taxation is on actual profits and not imaginary profits. I agree, on the whole, with the Solicitor-General that, though *Laycock* v. *Freeman, Hardy & Willis Ld.*[18] contains expressions of general utility, it is not conclusive or decisive in the present instance. Freeman, Hardy & Willis Ld. were retailers of boots and shoes. They had, until 1935, wholly owned and controlled separate entities which manufactured large numbers of boots and shoes, which were later sold by them in their shops. So long as the manufacturing businesses were separate entities, even though they were controlled by the retail company, the transfer of boots and shoes from a manufacturing business to the retail business inevitably took the form of a sale, notwithstanding that the prices might well be controlled by the retail buyer. In 1935 the entire business of the company was reorganized. The manufacturing businesses were put into liquidation, the assets and the undertaking being acquired by the retail business, so that, thenceforward there were not two entities, but one single enterprise of the manufacture and sale to the public of boots and shoes.

---

[16] 12 T.C. 21.

[17] Ibid. 27.

[18] [1939] 2 K.B. 1.

The question involved in the case was concerned with the "succession" to what was described as the manufacturing business; and the Court of Appeal held that Freeman, Hardy & Willis Ld. were a single entity, which both manufactured and sold shoes; that the activity of manufacture was not of itself a profit-making business; and, therefore, that there was no ground for suggesting that some notional figure must be ascribed to the manufacturing activities, as though they had formed a separate business selling to the retail house. I have, however, come to the conclusion that the principles which ought to be applied here were stated in the *Briton Ferry* case[19] in a form which inevitably applies to and covers the present case.

In one sense, the *Briton Ferry* case[19] was the converse of the *Freeman, Hardy & Willis* case.[20] The Briton Ferry Steel Co. Ld., which had at one time sold its manufactured products, namely, steel bars, to subsidiary companies which made tinplate, put the tinplate companies into liquidation, acquired their businesses and made the tinplate manufacturing businesses a branch of their own undertaking. For the sake of simplicity I will assume that there was but one tinplate business. After the amalgamation and reconstruction, therefore, the Briton Ferry Steel Co. Ld. carried on two enterprises or activities. One was the manufacture of steel bars from raw materials, and the other was the manufacture of tinplate from the steel bars, which for such purpose became the primary product. It is true that that case was concerned with "succession" for income tax purposes; but the question debated was: At what figure, for the purposes of the tinplate business, ought the manufactured raw material of steel bars to be brought into account? I think, therefore, that the analogy is close. If the business of steel bars is treated as the stud farm, then the steel bars become the colts and the fillies. It is true, as I have said, that the racing enterprise does not happen to be taxable, but it is also true that that fact, as I understand the Solicitor-General, is not relevant. If the question is, "At what figure, for the "purposes of the racing activity, ought the colts and fillies" (that is, the steel bars) "to be brought into account?" then, inevitably, that same figure must be the figure at which those same colts and fillies (that is, the same steel bars) should be shown as having left the stud farm (that is, the steel bar manufacturing business).

---

[19] [1940] 1 K.B. 463.

[20] [1939] 2 K.B. 1.

The principle which is involved and, as I have earlier indicated, which requires us to conclude this case in the taxpayer's favour, is thus stated by Sir Wilfrid Greene M.R.[21]: " The problem, therefore, is to arrive at the taxpayer's profit in " accordance with the section, and anything in the shape of a " notional sale must be rejected if that would involve ascribing to " the taxpayer a profit which he has never earned. . . The " solution, in my judgment, is along different lines. It seems to " me that the businesses acquired may properly, for the purposes " of the sub-rule, be treated, and should be treated, as beginning " at the steel bar stage, namely, the stage when those branches " of the business procure for themselves a steel bar. Obviously " in order to arrive at profits of those branches of the business on " that basis, some figure must be brought into account to repre- " sent the cost of the steel bar. If that figure is based on an " imaginary sale price at a profit, it is an unreal figure. If, on " the other hand, it is brought in at the actual cost of producing " that steel bar, it is a real figure; and treating—as we are bound " by the rule to do—the two parts of what is in truth one " business as though they were held apart, the only way in " which, in my judgment, that direction can logically be carried " out is the way that I have indicated, of bringing in the raw " material, namely, the steel bar, at the actual cost of produc- " tion." In the present case, it seems to me that we are bound (to use the language of Sir Wilfrid Greene M.R.) to treat as consisting of two parts what is in fact a single entity, that is to say, we are bound to treat Lady Zia Wernher's activities in connexion with racehorses as divided into two parts—part one being the stud farm and the second part being her racing activities. As I have already said, it seems to me irrelevant that the figure being considered in the *Briton Ferry* case [22] was what I would call the entry figure for the moved item when it arrived in the second part of the total of the activities. The same figure must have been brought into account as the removal figure of that item when it was transferred from the first part of the total activities. Therefore, if for the words " steel bars " the words " colts and fillies " are substituted, it seems to me that the language of the *Briton Ferry* case [22] must apply in the present case. I think that it is our duty to apply the principle stated in that case, and that for the purpose in hand, there being an artificial division imposed by Parliament on the total of the activities of a single individual, we must bring in or insert into the horse account a real figure, and not an unreal figure.

---

[21] [1940] 1 K.B. 463, 483; 23 T.C. 414, 434.

[22] [1940] 1 K.B. 463.

It follows from what I have said that, in my judgment, the principle stated and the reasoning underlying the judgment of Sir Wilfrid Greene M.R. in the *Briton Ferry* case [22] are inconsistent with the conclusion in *Watson Bros.* v. *Hornby*,[23] and, therefore, inconsistent with the conclusion of Vaisey J.[24] which followed that case. A number of other cases were cited and instances given in the course of argument, but it is not necessary to refer to them, for I think that they add nothing to the reasons which I have attempted to state. For those reasons I think that this appeal must be allowed.

JENKINS L.J. stated the facts, and continued: In contending that the proper figure to enter in the accounts of the stud farm is the cost of breeding the horses transferred to the racing stables, Mr. Graham Dixon goes back to first principles. He begins his argument by referring to the relevant charging provisions in paragraph 1 of Schedule D to the Income Tax Act, 1918, under which the tax extends to " profits or gains arising or accruing ". . . from any trade . . ." He says that those words mean profits and gains really and truly arising or accruing from the trade, and refer to actual realized profits and to nothing else. He claims that, according to the first principles of income tax law, no man is bound to make a profit in his trade; he can trade or not, as he pleases, and sell his stock in trade or not, as he pleases, and he ought not to be charged upon any hypothetical basis for profits which he might have made, had he been so minded, or on profits which he has elected to forgo. Applying these general principles to the present case, Mr. Graham Dixon says that there is no more ground here for crediting the stud farm business with the market value of the five horses withdrawn than there would be for charging Lady Zia with the market value of horses which she might choose to withdraw from the stud farm business and to dispose of by way of gift. He submits that unless and until the horses are sold, no profit enters into the case; there is no actual realized profit, there is merely the possibility of sale at a profit at some future date, and that possibility cannot attract tax.

In support of his argument Mr. Graham Dixon referred the court to a number of general statements in the authorities, in particular to *Dublin Corporation* v. *M'Adam (Surveyor of Taxes)*,[25] which he cited for the proposition stated by Palles C.B., that a man cannot trade with himself. He also referred us to *Gresham Life Assurance Society* v. *Styles*, for the following statement of Lord Halsbury [26]: " The thing to be taxed is the amount of profits " and gains. The word ' profits ' I think is to be understood in its " natural and proper sense—in a sense which no commercial man " would misunderstand. But when once an individual or a " company has in that proper sense ascertained what are the " profits of his business or his trade, the destination of those " profits, or the charge which has been made on those profits by " previous agreement or otherwise is perfectly immaterial." Again, for the general principle, Mr. Graham Dixon referred us to *Glenboig Union Fireclay Co. Ld.* v. *Inland Revenue Commissioners*,[27] for an observation by Lord Clyde, the matter under discussion being the quality of a sum received by a fireclay company in respect of the sterilization of a seam of fireclay for the purpose of ensuring support to a railway. Lord Clyde said [28]: " But, even so, it is a consideration or substitute, not for profits " earned or capable of being earned, but for profits irretrievably " lost and incapable of being ever earned. The taxing Acts deal " with profits made, not with profits lost—with actual, not with " hypothetical profits—and it is by the words of the taxing Acts " that we are bound."

---

[22] [1940] 1 K.B. 463.
[23] 24 T.C. 506.
[24] [1953] Ch. 782, 784.

Mr. Graham Dixon also relied on the cases to which my Lord has referred of *Laycock* v. *Freeman, Hardy & Willis Ld.*[29] and *Briton Ferry Steel Co. Ld.* v. *Barry*.[30] Whilst these cases admittedly deal with a different question, that is to say, succession to a trade or business, he relied on certain observations of Sir Wilfrid Greene M.R. which, he claimed, supported his contention in the present case. My Lord has already referred to the more material passages in the *Briton Ferry* case,[31] and I will not repeat his citations. I would, however, add a reference to a passage from the *Freeman, Hardy & Willis* case, which seems to me to assist Mr. Graham Dixon's contention. The question was whether the appellant company, Freeman, Hardy & Willis Ld., having absorbed two subsidiary companies, which formerly manufactured boots and shoes and sold them to the parent company for resale in their retail shops, had succeeded to the wholesale business formerly carried on by the subsidiaries. Sir Wilfrid Greene M.R. said [32]: "The profit that Messrs. Freeman, "Hardy & Willis Ld. now make by selling those products retail in "their shops is realized by the intervention of the retail business, "which was their business all along, and is their old business. "It therefore seems to me impossible to predicate of the profits "which they make by selling in their retail shops these boots "and shoes manufactured in these factories that they are profits "referable, for the purpose of the rule, to the trade to which "they succeeded. Now the Crown endeavours to get out of "that difficulty by an argument to this effect; it says: "The profit which is made by selling the boots and shoes retail "in the shops can, for the present purpose, be dissected and "split up into two profits, the wholesaler's profit and the retailer's "profit, and in so far as the profit is referable to the head of "the wholesaler's profit, that is to be deemed for the purpose "of the rule to be the profit derived from the carrying on of "the trade taken over. In my judgment, that is wholly "illegitimate. There is no such thing in a case of this kind, "for any income tax purpose, as a wholesaler's profit; it is wholly "non-existent. The expression is a convenient one from the "point of view of accountants, whose task it is to dissect profits "and attribute them in part to one aspect of their client's "activities, and in part to another aspect of their client's activities. Obviously a wholesaler makes a wholesaler's profit; a "retailer makes a retailer's profit; but to say of a manufacturer "who sells retail that he makes two profits, a wholesaler's profit "and a retailer's profit—although for accountancy purposes it "may be very convenient and useful that the accounts should be "kept on that basis—has no reality in fact, since no profit is "realized until the goods are sold, and the profit that is realized "is the profit realized by disposing of the goods by sale." In my view, that passage, as well as the passages in the *Briton Ferry* case [33] to which my Lord has referred, does support Mr. Graham Dixon's contention. There has been no sale in this case—no realization of any profit; and there is no justification for assuming a sale for the purpose of imputing to Lady Zia a profit which she has never in fact realized.

---

[25] (1887) 2 T.C. 387.

[26] [1892] A.C. 309; 8 T.L.R. 618; 3 T.C. 185, 188.

[27] (1922) 12 T.C. 427.

[28] Ibid. 449.

[29] [1939] 2 K.B. 1.

[30] [1940] 1 K.B. 463.

[31] Ibid. 483, 484.

It has been urged on behalf of the Crown that the market value must be taken in order to give a true picture of the financial results to Lady Zia of the carrying on of the stud farm, and it is said that that is so because, as I have already mentioned, Lady Zia's main object in breeding horses is to supply her racing stable, and the effect of her operations in carrying on the stud farm is to supply her racing stable with horses. I confess that I am unable to follow that argument. The Crown say that the figure of market value can be adopted without assuming a sale of these five horses by Lady Zia. I cannot agree. It seems to me that the phrase "market value" necessarily means the price which the property in question would fetch if sold in the market, and, therefore, charging Lady Zia with a market price figure does mean assuming, for the purpose of calculation, that she has realized the horses by sale. That assumption, to my mind, by no means gives a true picture of the financial results to Lady Zia of carrying on the stud farm. There is no sale and no realization of the market value. All that has happened is that these horses, for reasons which seemed sufficient to Lady Zia, have been withdrawn from the trade and placed at the racing stable. They are the same horses as they were when they were included in the assets of the stud farm. Their value has not increased merely by their being moved to the racing stable. If Lady Zia did not choose to realize these horses in the course of the stud farm business, but preferred to withdraw them and send them to the racing stable, it cannot, in my view, be said that she has by that transaction made any profit in her trade or business of a stud farm, even though she may sell them at a profit at some future date.

---

[32] [1939] 2 K.B. 1, 11; 22 T.C. 288, 300.

[33] [1940] 1 K.B. 463, 483; 23 T.C. 414, 434.

For these reasons, both on principle and on the authorities, the conclusion contended for on behalf of the taxpayer is, in my opinion, the right one, and the figure to be credited to the books of the stud farm in relation to these five horses should be the cost figure. Vaisey J. took a different view, but, as appears from his judgment, he did so largely because he considered himself bound by *Watson Bros.* v. *Hornby.*[34] In my view, Vaisey J., sitting as a judge of first instance, was right in considering himself so bound, and though I agree with the Master of the Rolls that *Watson Bros.* v. *Hornby*[34] cannot stand with the *Freeman, Hardy & Willis* case[35] and the *Briton Ferry* case,[36] it is to be observed that *Watson Bros.* v. *Hornby*[37] was later in date than either of those two cases, which would have made it difficult for the learned judge, sitting at first instance, to do otherwise than to hold that they were distinguishable from *Watson Bros.* v. *Hornby,*[37] since it was not necessarily to be assumed that

---

[34] 24 T.C. 506.

[35] [1939] 2 K.B. 1.

[36] [1940] 1 K.B. 463.

[37] 24 T.C. 506.

Macnaghten J., when he decided that case, had not the two earlier cases in mind. Accordingly, in the state of the authorities, in my view, Vaisey J. had no option but to conclude as he did in favour of the Crown.

There is, I think, nothing further that I can usefully add, except to express agreement with what the Master of the Rolls has said about *Inland Revenue Commissioners* v. *William Ransom & Son Ld.*,[38] where the figure of market value was taken in a case in which, according to the principles which in my view, should prevail, the cost would have been the appropriate figure. There was no argument in that case as between the cost figure and the market value figure, and it cannot in my view be regarded as any authority for saying that the market value figure ought to be adopted in the present case. Accordingly, for the reasons which my Lord has given, and such reasons as I have been able to add myself, I agree that this appeal should be allowed.

HODSON L.J. I agree. Vaisey J. said that he based his decision in this case on the fact that it was, in his judgment, indistinguishable in principle from the decision of Macnaghten J. in *Watson Bros.* v. *Hornby*.[39] I agree with him that this case is so indistinguishable, and I agree with my Lords that, in the circumstances, Vaisey J. was right in following that decision. But, in my judgment, for reasons which have been given, the decision in *Watson Bros.* v. *Hornby* [39] is inconsistent with principle and authority, and ought to be overruled.

The position in the present case is that there was no sale from the stud farm to Lady Wernher in her capacity as racehorse owner, and there is no justification for valuing the horses at market value, which is, I think, the same thing as treating the horses which passed from the stud farm to herself in the latter capacity as having passed by a notional sale. I am of the opinion that the authorities quoted by the Master of the Rolls—*Laycock* v. *Freeman, Hardy & Willis Ld.*[40] and *Briton Ferry Steel Co. Ld.* v. *Barry* [41]—are both strongly in favour of the contention of the taxpayer and illustrate the general principle for which he has contended. I agree that the appeal should succeed.

Appeal allowed. Assessment discharged.

Solicitors: *Withers & Co.; Solicitor of Inland Revenue.*

E. D.

---

[38] 12 T.C. 21.

[39] 24 T.C. 506.

[40] [1939] 2 K.B. 1.

[41] [1940] 1 K.B. 463.

In re WILSON, DECD.
GRACE *v.* LUCAS AND OTHERS.

[1953 W. 3846.]

1954
Mar. 11,
12, 26.

Vaisey J.

Adoption—Succession—Conflict of laws—Intestacy—Adopters domiciled in England—Child born and adopted in Canada—Death of adopter intestate—Entitlement of child on intestacy—Adoption Act, 1950 (14 *Geo.* 6, *c.* 26), *s.* 13 (1) (4).
Conflict of Laws.

Spouses who were British subjects domiciled in England obtained in Montreal, Quebec, an order effecting the adoption as their child of an infant born in Montreal. The husband died intestate:—

Held, in deciding that the adopted child was not entitled to succeed under the intestacy as his child:

(1) that the question whether an adopted child can succeed to property as the child of an adopter dying intestate is to be determined by the law governing the succession, not by that governing the adoption;

(2) that an adoption effected under a foreign jurisdiction, in any event where no adopter was there domiciled at the date of the adoption, cannot give to the adopted person rights under the English law of intestacy.

In re Goodman's Trusts (1881) 17 Ch.D. 266; *In re Andros* (1883) 24 Ch.D. 637; *In re Luck's Settlement Trusts* [1940] Ch. 864; 56 T.L.R. 915; [1940] 3 All E.R. 307; *In re Fletcher, decd.* [1949] Ch. 473; [1949] 1 All E.R. 732; *Ross* v. *Ross* (1880) 129 Massachusetts Reports 243; *Burnfiel* v. *Burnfiel* [1926] 2 D.L.R. 129; *In re an Infant* [1934] N.S.W.S.R. 349; *In re Pearson* [1946] V.L.R. 356 and *In re Brophy* [1949] N.Z.L.R. 1006 considered.

ADJOURNED SUMMONS.

In 1939 the testator, Guthlac Wilson and his wife, who were British subjects domiciled in England, obtained an order of the Superior Court of Montreal in the Province of Quebec, Canada, effecting the adoption by them of a male infant. In 1946 the marriage was dissolved, both parties ultimately marrying again. In 1953 the testator and his second wife were killed in an aeroplane accident. She was older than he and was, therefore, presumed to have predeceased him and, save for a specific bequest to his surviving executor, he died intestate, survived by two sisters and by the adopted son. On November 4, 1953, the surviving executor took out this summons for the determination of the question whether the property as to which the testator died intestate ought to be held in trust (a) for the two sisters in equal shares absolutely, or (b) for the adopted son on the statutory trusts mentioned in section 47 of the Administration of Estates Act, 1925, and subject thereto for the two sisters as aforesaid, or (c) on some other and if so what trusts.

During the hearing the effect of section 13 (1) of the Adoption Act, 1950,[1] was considered by the court.

The facts are fully stated in the written judgment of Vaisey J.

J. L. Arnold for the plaintiff, the surviving executor.

R. W. Goff Q.C. and *Harold Lightman* for the sisters. The question is whether this adopted son, who was adopted in Quebec, can inherit the property of the adopting father who was domiciled in England and died intestate. The adopting parents were domiciled in this country; and an adopted child who is to be able to inherit on intestacy must be resident here and adopted by virtue of an order made here. Whatever the position would be if the parents and child were all domiciled in the place where the order was obtained—in this case, Quebec—it is a totally different matter where the parents were domiciled in England and the child was born in Montreal and it is not known where its domicile was. The court will not recognize the order, if for no other reason than that English law requires a judicial investigation before an adoption order can be made and that the child was not within the jurisdiction. There are also other considerations. First, the matter is to be determined by the law governing the succession, not by that governing the adoption; secondly, even if the court did accord to this child the status of an adopted child, that status, unlike the status of legitimacy, would not bring the child within the class of persons entitled to take under English law; and thirdly, this particular order has only local effect, because the parties were not all domiciled in Montreal, and the court here will not recognize it for purposes of succession. The matter has not hitherto been decided by authority—see Theobald on Wills, 11th ed., at pp. 282 et seq. and notes thereto—having been only raised and not decided in *In re Fletcher.*[2] The law of the Dominions differs. In *In re Donald* [3] it was held that a child who had been adopted under the law of Washington could not take under a gift to children in the will of a testator domiciled in Saskatchewan, notwithstanding that by the law of Washington the child would have taken. On the other hand, in *In re Pearson* [4] the question whether a child adopted under Tasmanian law could take under a gift to children in the will of a testator domiciled in Victoria was governed by Tasmanian law, and it was held that that child could not so take because, under the relevant Tasmanian statute, the will had to be executed after the adoption order was made. Again, in *In re Brophy* [5] there was a gift to issue in the will of a testator domiciled in New Zealand; under the law of New Zealand, a child who had been adopted under the law of New York could have taken under that gift; but under the law of New York it was held that he could not do so. True, the analogy of the cases on legitimation suggests that the matter is to be determined by the law governing the adoption: *In re Goodman's Trusts* [6]; *In re Andros* [7]; but doubt has been cast on the relevance of that analogy: see Theobald on Wills, 11th ed., p. 282; Dicey, Conflict of Laws, 6th ed. (1949), pp. 511–4.

---

[1] Adoption Act, 1950, s. 13 (1): "Where, at any time after the "making of an adoption order, the "adopter or the adopted person or "any other person dies intestate in "respect of any real or personal "property (other than property sub- "ject to an entailed interest under a "disposition made before the date of "the adoption order), that property "shall devolve in all respects as if "the adopted person were the child of "the adopter born in lawful wedlock "and were not the child of any other "person."

Subs. (4): "The references in this "section to an adoption order include "references to an order authorizing "an adoption made after the com- "mencement of this Act under the "Adoption of Children Act (Northern "Ireland), 1929, or any enactment "of the Parliament of Northern Ire- "land for the time being in force."

Canadian law expressly gives to a person who is born outside the province a standing inside the province; that is precisely the kind of relief which is not given by English law.

In *In re an Infant,*[8] a case decided in New South Wales, it was held that under section 127 of the Child Welfare Act, 1923, an order for adoption could validly be made if, at the time, the adopting parents or parent and the child to be adopted were either resident or domiciled in New South Wales. That kind of decision, however, will not help in the present case, where the adopting parents were domiciled in England. Where that is so the court will not recognize an adoption order made by a foreign court: see Cheshire, Private International Law, 4th ed., p. 401. In *Ross* v. *Ross,*[9] a decision in Massachusetts, it was held that a child adopted in another State, with the consent of its father and the sanction of a judicial decree, was held to have the same rights of inheritance as legitimate offspring in the estate of the adopting father. Again, in *Burnfiel* v. *Burnfiel*[10] it was held that a person who had been adopted under a jurisdiction which recognized adoption could not have, under a jurisdiction which did not recognize it, the status of an adopted child so as to inherit property within the jurisdiction which did not recognize it; and in *In re Luck's Settlement Trusts*[11] it was held that, as the British father of an illegitimate son born in California had not, at the date of the son's birth, acquired a domicile of choice in California, a declaration of adoption in California could not be taken by the English court to have rendered the son legitimate; that the principle applied by the authorities with regard to legitimation by subsequent marriage applied to the case; and that since, by the law of the father's domicile at the date of the son's birth, the relationship was that of putative father and illegitimate child, which nothing could change, the son took no interest.

---

[2] [1949] Ch. 473; [1949] 1 All E.R. 732.

[3] [1929] 2 D.L.R. 244.

[4] [1946] V.L.R. 356.

[5] [1949] N.Z.L.R. 1006.

[6] (1881) 17 Ch.D. 266.

[7] (1883) 24 Ch.D. 637.

[8] [1934] N.S.W.S.R. 349.

[9] (1880) 129 Massachusetts Rep. 243.

In the present state of the authorities, therefore, the court is quite free, and the proper decision in the present case is that the property as to which the testator died intestate ought to be held in trust for the two sisters in equal shares absolutely.

Geoffrey Cross Q.C. and *John Bradburn* for the adopted son. For the sisters it was contended that a foreign adoption order ought not to be given effect to in England for the purposes of succession, or, if that proposition be too wide, that at any rate the order in the present case ought not to be given effect because the adopted child was domiciled in Quebec and the adopting parents were domiciled in England.

The common law of England did not recognize the concept of adoption. The Adoption Act, 1926, introduced the status of adopted child, but did not alter rights of succession. The Adoption Act, 1950, places a child adopted under an English order on the same footing for succession purposes as a child born in lawful wedlock.

As to the contention that a foreign adoption order ought not to be given effect to for the purposes of succession, in a case where the adopted child and adopting parents were all domiciled, for example, in Quebec, the court in England would, on the principle of comity, give the child the rights of succession accorded to it by the law of Quebec: cf. Cheshire, Private International Law, 4th ed., p. 402. The statement there and the authorities decided in the Dominions show that that contention for the sisters is too wide: see *In re Pearson*[12] and *In re Brophy*,[13] which together represent accurately the present position with regard to this question in the conflict of laws.

---

[10] [1926] 2 D.L.R. 129.

[11] [1940] Ch. 864; 56 T.L.R. 915; [1940] 3 All E.R. 307.

As to the contention that at any rate the order in the present case ought not to be given effect to because the child was domiciled in Quebec and the adopting parents were domiciled in England, the position is correctly stated in the American Restatement of the Law, Conflict of Laws Volume. Section 142 states: "Law "Governing Adoption. The status of adoption is created by "either: (*a*) the law of the state of domicil of the adopted child; "or (*b*) the law of the state of domicil of the adoptive parent "if it has jurisdiction over the person having legal custody of the "child or if the child is a waif and subject to the jurisdiction of "the state." Section 143 provides: "Effect of Foreign Adop-"tion. The status of adoption, created by the law of a state "having jurisdiction to create it, will be given the same effect in "another state as is given by the latter state to the status of "adoption when created by its own law." The authors of this work clearly consider that the material domicile is that of the adopted child, even if that of the adopting parents is different. In the present case, the circumstance that the child was domiciled in Quebec and the parents were not is not fatal to the adopted son's claim. True, the court in England must, in every such case, scrutinize with some care the foreign legislation as to adoption; but, so long as the adopting parents fulfil the requirements as to age and sex and the proper inquiries are made and the requisite consents given, a foreign adoption order ought to be effectuated, as suggested by the American Restatement, notwithstanding that the adopting parents are not domiciled in the State of the child's domicile.

R. W. Goff Q.C. in reply. There is no escape from the position that a child out of the jurisdiction cannot be adopted in conformity with the requirements of English law, and it is to be noted that even where, as in the present case, the adopting parents are, or were, of English domicile, that makes no difference.

Cur. adv. vult.

1954. March 26. VAISEY J. delivered the following written judgment: This summons, intituled in the matter of the estate of Guthlac Wilson, deceased, to whom I will refer as the testator, raises the question of the devolution of the property, which in fact was personal property, as to which he died intestate, and particularly as to the rights (if any) of his adopted son, the infant defendant Philip Guthlac Wilson, who is now about 15 years of age. The adoption was not effected under English law, but under the law of the Province of Quebec, in circumstances which I must presently describe. For some, and perhaps many, purposes an adoption so made would, in my judgment, be recognized as valid in this country; but the point, and the only point, which I have to decide is whether it entitled the infant defendant to participate in or succeed to the property of the testator not effectually disposed of by his will, just as though he had been the testator's own child.

---

[12] [1946] V.L.R. 356.

[13] [1949] N.Z.L.R. 1006.

The testator was married twice. He was by profession a consulting engineer, which necessitated his making journeys to many different parts of the world. His first marriage took place at Shanghai on May 30, 1933. Thereafter, he and his first wife lived for some years in India, making periodic visits to England. In about 1937 or 1938 they went to live in the married quarters of Harvard University in the State of Massachusetts, where the testator was studying for a degree, and it was while they were residing there, their marriage having been childless, that they decided to adopt a child. They had come to the conclusion that it would be better to adopt a Canadian rather than an American child, and for that purpose they went to Montreal in the Province of Quebec, and obtained an order from the Superior Court of that Province, dated November 3, 1939, effecting under the law of that Province the adoption of the infant defendant as the child of the testator and his first wife.

Now it is clear, and there is no dispute about it, that the testator and his first wife were British subjects domiciled in England during the whole period of their marriage, and particularly at the time when they obtained the said adoption order in Quebec. It is also clear on the evidence that the only reason why no adoption order was ever sought in this country was that the testator and his first wife were advised by a solicitor of the Welfare Organization in Montreal, who arranged the adoption, that there would be no necessity for any such step to be taken. This advice was, unfortunately, accepted and relied upon, and therefore the status of the infant defendant as an adopted child of the testator and his first wife depends entirely on the order of the court of Quebec.

I will next describe shortly the history of the infant defendant so far as it is or may be material for the purposes of this judgment. He was born in Montreal on April 7, 1939. He began a probationary period of residence with the adopters (as required by the law of Quebec) on May 4, 1939. Shortly after the making of the order he was taken to England and remained there with the adopters until August, 1940, when the testator's first wife, on account of the air raids, took him back to America where they stayed with friends until 1942. In November of that year she returned to England to rejoin the testator, leaving the infant defendant in the United States. He subsequently returned to this country in the care of a friend to rejoin the adopters. This was in October, 1943. The testator's first marriage was dissolved on January 7, 1946, by decree of the Probate, Divorce and Admiralty Division of this court on the petition of the wife, who later married again, and is now Mrs. Mainwaring. No order as to custody or maintenance was asked for or made, it having been agreed between the parties that the infant defendant should remain, as he did, with Mrs. Mainwaring. The testator voluntarily paid her an annual allowance of £200 for him, and a similar allowance for herself, and these he continued to pay for the rest of his life. He never ceased to recognize and treat the infant defendant as his own child, giving him handsome presents at Christmas and on his birthday. For some time after the divorce he visited the infant defendant frequently, but as these visits seemed to upset the child the testator agreed at Mrs. Mainwaring's request to give them up.

The testator also married again. By his will dated July 3, 1947, he appointed his second wife and the plaintiff Henry Grace to be his executors, and bequeathed certain books to the plaintiff and a policy of insurance for £5,000 to his wife, requesting her (but in such terms as not to impose any legal obligation on her) to use the proceeds or part thereof for the benefit of the infant defendant during his minority. He then gave the rest of his estate both real and personal to his wife absolutely.

The testator died on March 29, 1953, being killed in an aircraft accident together with his wife. It was uncertain which of them survived the other, but she was the older of the two and is therefore, under section 184 of the Law of Property Act, 1925, presumed to have died before him. Consequently, except as regards the books bequeathed to the plaintiff, he died intestate as to the whole of his estate. He had no real estate, but his personal estate was of a net value of upwards of £20,000. He left no issue or parent him surviving, and the persons entitled

1954

WILSON, DECD., *In re.*
GRACE
v.
LUCAS.

Vaisey J.

under his intestacy to his personal estate (in the event of the infant defendant being held not be to so entitled) are his two sisters, the defendants Dione Narona Margaris Lucas and Orrea Pernel.

Now it is quite clear under section 13 of the Adoption Act, 1950, that where at any time after the making of an adoption order under that Act, an adopter dies intestate, his property is to devolve in all respects as if the adopted person were a child of the adopter born in lawful wedlock. And it is noticeable that under subsection (4) of that section the preceding references to an adoption order are to include references to an adoption order made in Northern Ireland, but with that exception the adoption orders referred to in the said Act are orders made by the courts in this country.

In the present case we have an order made under an alien jurisdiction at the suit of persons domiciled not in the country to which that jurisdiction belonged but in England, and it is difficult to see on what basis an adoption order made under a foreign jurisdiction could be brought either expressly or by implication within either the provisions or the principles of section 13. It must be remembered that adoption in the sense of the transfer of parental rights and duties in respect of a child to a person other than the child's natural parent, and their assumption by such other person, is unknown to the common law; and the principle of legal adoption was introduced into our law for the first time by the Adoption of Children Act, 1926. It would certainly be very surprising if the artificial relationship arising from an adoption effected under an alien jurisdiction were to give rise to rights of inheritance such as are properly derived through a natural relationship. It must always be remembered that while the effect of an adoption may be superficially much the same, however and whenever made, the methods of making it, and the conditions under which it is possible to make it, and the consequences of its being made are subject to almost infinite variations of detail. Thus, in some countries adoption can only be made with the consent of the person adopted, and there are all manner of qualifications and limitations on the creation of the relationship which can seldom or perhaps never be identical in the case of any two systems of law. Reference may be made to the article "Adoption" by the late Sir Alfred Hopkinson, which is to be found in the more recent editions of the Encyclopaedia Britannica. In some cases, adoptions in foreign countries are subject to restrictions and regulations more or less analogous to, but never, I suppose, identical with, those which obtain in this country. In other cases, the divergence is very wide indeed. In some countries, I understand, the adopted person may be of any age, that is to say, not necessarily an infant. And it can hardly be supposed that any process calling itself an adoption, irrespective of its content, could possibly give rights of succession under the English law of intestacy to the adopted person. For example, an adoption effected under Indian or other Oriental law could hardly be supposed to have any such consequence; and though the position is not so obviously anomalous in regard to adoptions made under systems substantially, although not exactly, similar to ours, the question inevitably arises where the line is to be drawn. For example, am I to scrutinize the laws of the Province of Quebec, which are by no means the same as the English law of adoption, and see whether, in my judgment, they come sufficiently close to such last-mentioned law to oblige or allow me to say that an adoption effected in that province is for the relevant purposes exactly the same in its consequence as one made under the law of England? Such a task is, in my judgment, quite beyond my powers. It must always be remembered that these persons, the testator and his first wife, were never domiciled in the Province of Quebec, and that they merely, as it were, strayed within the jurisdiction for no other purpose than the adoption of the infant defendant. What the position would have been if the adopters in the present case as well as the infant had been domiciled in Quebec I need not inquire. But, if this adoption was effective for the purposes of an intestate succession, it would apparently be quite possible for would-be adopting parents to pay a short visit to any country whose laws were less stringent than the laws of their proper domicile, so as to give it the same effect as if they had proceeded under the latter laws; that is, the laws of their proper domicile.

No –
Consider the
Act of
adoption

I have already said that the adoption in this case, however irregularly obtained, would no doubt be recognized for some purposes, as for example, by being recognized for the purposes of orders for custody, if such had been sought for at the time of the testator's divorce.

In Theobald on Wills, 11th ed., at p. 282, it is pointed out that adoption is, in the absence of statutory provision, governed by the law of the domicile of the adopter and of the child, but that it does not follow that that law will determine whether an adopted child can succeed to property as a child of the adopter.

1954

WILSON, DECD., *In re.* GRACE *v.* LUCAS.

Vaisey J.

The question is said to be whether the capacity of the adopted child to succeed to property is a matter of status governed by the law governing the adoption, or a matter of succession governed by the law governing the succession, which is, of course, in the case of movables, the testator's or intestate's domicile.

It is said that there is no English authority on the question and that Dominion authorities conflict. It is stated in the textbooks that the analogy to the cases of legitimation suggests that the law governing the adoption would be applied but, in my view, the analogy is inapplicable and the matter is one to be determined by the law governing the succession. For myself, I cannot see how our Adoption Act could contain any provision for recognizing and giving effect in England to an adoption effected under a foreign law, having regard to the extreme divergence which exists between the various kinds of adoption which are to be found under the various systems of foreign law.

I will now refer briefly to the various authorities to which my attention was called. They do not afford any clear guidance on the point which I have to consider. I will say at once that those relating to legitimation have, I think, to be applied, if at all, with great caution, for in contrast to adoption the meaning of legitimation is plain and unambiguous. When a person is said to have been legitimated there is little, if any, room for doubt as to what is intended; that is to say, it means that he has been placed in the position of one born in lawful wedlock. Adoption, on the other hand, is the creation of a purely artificial relationship with characteristics which are quite undefined; they vary from place to place, as I have already said.

The first case is *In re Goodman's Trusts*,[1] where a majority judgment of the Court of Appeal, reversing a decision of Sir George Jessel M.R., held that a child legitimated according to the Dutch law was entitled to a share in the personal estate of an intestate as one of her next-of-kin under the Statute of Distributions. Then *In re Andros* [2] is a decision of Kay J., where he held that a bequest of personalty in an English will to the children of a foreigner was to be construed to include children legitimated by the law of their father's domicile. *In re Luck's Settlement Trusts* [3] decided that an adoption effected under Californian law could not be taken by the English courts to have rendered the adopted child legitimate on the ground that the father was not domiciled in California at the date of the son's birth. Perhaps the nearest case to the present is that of *In re Fletcher, decd.*,[4] but the point now in issue was not decided, and the case is really only an authority for the proposition that in the absence of legitimate children (a circumstance known to the testator), adopted children could take as children upon the true construction of a testamentary instrument.

---

[1] (1881) 17 Ch.D. 266.

[2] (1883) 24 Ch.D. 637.

[3] [1940] Ch. 864; 56 T.L.R. 915; [1940] 3 All E.R. 307.

I now come to an American case, namely, *Ross* v. *Ross.*[5] There, a child adopted in another State, where the parties were domiciled at the time, was held to have the same rights of inheritance as legitimate offspring in the property of the adopting father. That case was decided in the year 1880, and shows that while adoption was unknown to the law of England or Scotland, it had already been introduced from the law of France or of Spain into a large proportion of the States of the Union.

I now come to a Canadian decision, namely, *Burnfiel* v. *Burnfiel*,[6] where it was held that a person adopted under one jurisdiction recognizing adoption cannot claim the status of a child under a jurisdiction not recognizing adoption so as to claim to inherit property situate within the latter jurisdiction. That case was decided in 1926, and in 1934 there was a case in New South Wales cited as *In re an Infant*,[7] which held that an order for adoption might be validly made under the New South Wales statute where, at the time of the making of the order, the adopting parents or parent and the child to be adopted were either resident or domiciled in New South Wales. The effect of such orders outside New South Wales was considered, and it was apparently thought that the case of legitimation differed in material respects from the case of adoption. In 1946 the case of *In re Pearson*[8] was decided in the State of Victoria, and it was there held that the question whether or not an infant was issue of an adopter for the purposes of his will must be determined by the law of his domicile, and that the infant in question was not such issue on the ground that his will was prior in date to the adoption order. Finally, there is *In re Brophy*,[9] where a child adopted under the law of New York was held not entitled to take under a gift to issue contained in the will of a testator domiciled in New Zealand, although had he been adopted in New Zealand he would have taken.

Dicey's Conflict of Laws, 6th ed. (1949), at p. 512, puts the

---

[4] [1949] Ch. 473; [1949] 1 All E.R. 732.

[5] (1880) 129 Massachusetts Rep. 243.

[6] [1926] 2 D.L.R. 129.

[7] [1934] N.S.W.S.R. 349.

[8] [1946] V.L.R. 356.

[9] [1949] N.Z.L.R. 1006.

1954

WILSON, DECD., *In re.* GRACE *v.* LUCAS.

Vaisey J.

matter thus: "The question whether an adopted child can "succeed as a child . . . under an intestacy . . . is (semble) "determined by the law governing the succession, that is, the "law of the domicile of the . . . intestate at the date of his "death. . . ." There follows some discussion whether English courts would give any effect to an adoption effected in a foreign country, and the question is left, as far as I can understand, indeterminate.

In my judgment, if the testator had been domiciled in Quebec at the time when the infant defendant was adopted, the case of the latter would have been different and very much stronger. But the fact is that the advice which the testator received that an adoption by the English courts was a superfluous precaution was, as I think, erroneous. In Professor Cheshire's Private International Law, 4th ed., at p. 402, the conclusion apparently is that recognition of a foreign adoption will have to be refused in all cases where any one of the two parties—that is to say, either the adopter or the child—is domiciled in England.

It is clear that the adoption order of the Quebec court was perfectly valid according to the law of Quebec, which permitted adoptions to be made at the suit of persons outside its jurisdiction, but I decide on the whole that the infant defendant is not entitled, and have come to the conclusion that the estate of the testator as to which he died intestate should be held in trust for the sisters of the testator, in equal shares absolutely. I will so declare, and there will be the usual order for payment of costs out of the testator's estate.

Declaration accordingly.

Solicitors: *Hancock & Willis; Le Brasseur & Oakley.*

K. R. A. H.

1954
July 23, 27.

Roxburgh J.

HEASMAN *v.* JORDAN.

Revenue—Income tax—Special bonus—Attributable to work for several years—Not assessable as income of year of payment—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. E, rr.* 1, 5.

The appellant taxpayer was a financial accountant in a firm of aircraft manufacturers; he entered their employment on May 21, 1941, and was paid on a monthly basis. During the years 1941–45 the members of the monthly staff worked long hours for six and a half days a week and without normal holidays, for which they received no overtime pay on the understanding that they would receive compensation later.

As a result of a resolution of the board of directors of the company, dated June 27, 1945, the appellant received, in July, 1945, a special bonus payment of £1,250. The letter which accompanied this payment stated: " . . . the directors of the company decided "to mark their appreciation of the loyalty and industry of the "monthly staff during the war years in the form of a gratuity. "You have accordingly been allotted by them the sum of . . ."

It was admitted by the appellant that this was an emolument taxable under Schedule E, but he contended that it was not assessable as income of the year in which it was received but that it should be spread over the years in which it was earned. The General Commissioners held that, on the evidence and having regard to rules 1 and 5 of Schedule E, the bonus was an emolument assessable as income of the year in which it was received; on appeal from that decision:—

Held, that the words "for the year of assessment" in rule 1 of Schedule E meant, where reward for services was in question, "in "respect of services rendered during the year of assessment"; and that on the facts, and in particular on the terms of the letter accompanying the bonus, it was a reward for services rendered between May 21, 1941, and June 27, 1945, or the date in July, 1945, when it was paid. The appeal should be allowed and the case remitted to the commissioners for adjustment.

M'Keown v. *Roe* [1928] I.R. 195 and *Dracup* v. *Radcliffe* (1946) 27 T.C. 188 applied.

APPEAL from the Commissioners for the General Purposes of the Income Tax Acts for Kingston and Elmbridge.

The appellant, William John Heasman, appealed to the commissioners against an assessment for the year 1945–46 under Schedule E [1] in respect of the emoluments of his employment as financial accountant to Hawker Aircraft Ld., which included a special bonus of £1,250 paid to him by the company in July, 1945.

---

[1] Income Tax Act, 1918, Sch. E, rule 1: "Tax under this schedule "shall be annually charged on every "person having or exercising an office "or employment of profit mentioned "in this schedule, or to whom any "annuity, pension, or stipend, as "described in this schedule, is pay- "able, in respect of all salaries, fees, "wages, perquisites or profits what- "soever therefrom for the year of "assessment." Rule 5: "If at any "time, either during the year of "assessment or in respect of that "year, a person becomes entitled to "any additional salary, fees, or emo- "luments beyond the amount for "which an assessment has been made "upon him, or for which at the com- "mencement of that year he was "liable to be charged, an additional "assessment shall, as often as the "case may require, be made upon "him in respect of any such addi- "tional salary, fees or emoluments, "so that he may be charged in "respect of the full amount of his "salary, fees or emoluments for that "year."

It was not disputed that the special bonus constituted a taxable emolument, and the question in issue was whether the whole amount was assessable as income of the year in which it was received or whether it should be spread over a number of years.

The case stated, so far as material, provided: The appellant entered the employment of the company on May 21, 1941, as assistant accountant, and was soon after appointed financial accountant, and was employed with the company throughout the relevant period. His basic salary in the year 1945–46 was £800 per annum, and he was entitled to certain bonuses immaterial to this appeal and different from the bonus to which this appeal related.

During the period of the war, and in particular during the early years, the company was working under pressure to produce aircraft, for instance, the well-known Hurricane fighter, as rapidly and in as great numbers as possible. As a result it was necessary for all the company's employees in all departments to work long hours for approximately six and a half days per week and to sacrifice their normal holidays; but the exact period during which those long hours were worked varied from one department to another. Consequent upon agreements with trade unions and staff associations the weekly-paid employees of the company received overtime pay at premium rates for hours worked above the normal peacetime average, together with cost of living bonuses from time to time. However, the monthly-paid staff, of whom the appellant was one, did not receive similar additional remuneration to compensate them for their additional work.

On June 27, 1945, the board resolved that a bonus be paid to monthly servants, and that the distribution be settled by the local directors on the understanding that the total amount paid should not exceed £50,000 without reference to the full board. As a result, the appellant received in July, 1945, a bonus of £1,250, the subject-matter of the present appeal.

The assistant secretary and personnel manager of the company gave the following evidence, which was accepted by the commissioners: On many occasions from 1942 onwards members of the monthly-paid staff of the company had indicated to him that they were suffering financially by comparison with the weekly-paid staff, since the latter were receiving overtime pay for Saturday and Sunday work as well as for overtime work in the evenings and on bank holidays, and, in some cases, cost-of-living payments; while the former were receiving no such payments although they were working similar hours. The position was reported by him to the directors of the company, and the monthly-paid staff were told not to worry and that the matter would not be overlooked.

The division of the £50,000 among the monthly staff was worked out by the secretary. He divided the members of the monthly staff into four main departments and graded the staff in each, taking into consideration the period of paid monthly service and salaries but not bonuses, and based his recommendations on the principle that the monthly staff had been paid for their ordinary working hours and that the special bonus was for something outside their normal work. The four lists of recommended special bonuses were approved by the board. No attempt was made to apportion each special bonus to separate years of meritorious service. Cheques were then drawn and handed to the directors responsible for each section for personal distribution. The secretary himself distributed cheques to some members of the monthly staff; of these he told some that in the envelope was a cheque to put right what they had called being "hard done by" during the war; others he told it was to reimburse them for long hours for which they had not received overtime.

With the exception of the works' nurses who were paid monthly for convenience and staff who had newly joined the company, each member of the monthly-paid staff received a bonus payment, but no member of the weekly-paid staff received such a payment. None of the monthly staff who had been in the employment of the company during the whole or part of the war years but had left before June, 1945, received the special bonus.

Included among the monthly-paid staff who were recipients of the special bonus were some who had been recently transferred from the weekly-paid staff; in their case the amount of special bonus was comparatively small, being calculated by reference only to the period during which they had been monthly-paid, since, so long as they had been weekly-paid, they had been in receipt of overtime payments and cost-of-living bonuses. The amount of the special bonus received by a monthly-paid employee was, as a general rule, substantial, in many cases being the equivalent of not less than six months of current salary, and in some cases being in excess of a full year's salary.

Apart from directors and certain other senior members of the staff who were aware of the circumstances, all the recipients of the special bonus received a letter in the following terms: "At a "recent meeting, the directors of the company decided to mark "their appreciation of the loyalty and industry of the monthly-"staff during the war years in the form of a gratuity. You have

1954

HEASMAN v. JORDAN.

"accordingly been allotted by them the sum of . . . and I have "pleasure in enclosing a cheque for . . . representing the above "amount after deduction of tax."

The commissioners by their decision dated June 30, 1953, stated that having considered the evidence and rules 1 and 5 of Schedule E, they found as a fact that the bonus of £1,250 paid to the appellant by Hawker Aircraft Ld. in July, 1945, was an emolument of the year in which he received it.

The appellant appealed to the court from their decision.

F. Heyworth Talbot Q.C. and *H. Major Allen* for the appellant taxpayer. "For the year of assessment" in rule 1 of Schedule E must mean "in respect of" the year; that is the only construction consistent with the effect of rule 5. The bonus payment made in 1945 was a payment for work done during the war years 1941–45, and in respect of those years; accordingly, it should be assessed for tax for those years and the commissioners should apportion it over that period.

The commissioners were wrong in holding that it was to be assessed for the year in which it was received. A subsequent payment for work done earlier is assessable in respect of the year, or years, in which the work was done: *M'Keown* v. *Roe.*[2] In that case the judge said that rule 5, which provides for the making of additional assessments for any further payments of salary or fees, was a clear indication that the taxation of profits in respect of a particular year under Schedule E was not confined to the amount received in the year of assessment but included profits earned in that year but paid later. Although that case is not binding on this court, it was approved and followed by Macnaghten J. in *Dracup* v. *Radcliffe.*[3]

It is clear from the evidence, and in particular from the circular letter, that the payment was attributable to the extra work done by the monthly staff during the war, who (unlike the weekly staff) had received no extra remuneration. That letter alone is sufficient to justify the court in holding that tax should be assessed in respect of the years 1941–45. Even if the payment were not in respect of all those years, it was not wholly for the year 1945–46 for which the appellant was assessed.

Sir Lynn Ungoed-Thomas Q.C. and *Sir Reginald Hills* for the Crown. The words "for the year of assessment" in rule 1 of Schedule E equal "paid in the year of assessment," i.e., that salary or fees must be assessed for the year in which they are paid. In *Henry* v. *Foster*[4] it was held that compensation received by a director which equalled his remuneration for the last five years of his office as a director was assessable under Schedule E for the last year of his holding that office. It was said that such a lump sum by way of deferred payment could not be split up.

---

[2] [1928] I.R. 195.

[3] (1946) 27 T.C. 188.

Alternatively, the words "for the year of assessment" in rule 1 can be construed either as paid in the year of assessment or earned in the year of assessment, according to the circumstances of the case.

It is normal that a payment is made for services which have been rendered in that year, and the commissioners have found as a fact that the bonus was an emolument of the year in which the appellant received it; that is a finding of fact which should not be disturbed. The bonus was not expressed to be paid in respect of the years 1941–45; although the extra work done during the war may have provided the motive for making the payment, it was not expressed as being attributable to those particular years.

M'Keown v. *Roe*[5] is not binding on this court, and on the facts as found by the commissioners it would not be applicable. The decision of the commissioners should therefore be upheld.

Sir Reginald Hills following. A voluntary payment by an employer can only be assessable as an emolument of the year in which it is made; the proper test is, "When did the employee become entitled to the payment?" [Reference was made to *Glenboig Union Fireclay Co. Ld.* v. *Inland Revenue Commissioners*[6] and *Herbert* v. *McQuade*.[7]]

F. Heyworth Talbot Q.C. replied.

ROXBURGH J., having stated the facts: The words "for the "year of assessment" in rule 1 of Schedule E mean, in my judgment, "in respect of the year of assessment"; and, where reward for services is in question, mean "in respect of services rendered "during the year of assessment." Sir Lynn first submitted that the words "for the year of assessment" meant "paid during the "year of assessment"; but that is, in my judgment, in conflict with two cases to which I will refer, and would, moreover, have surprising consequences. Supposing that a quarter's salary due on April 1, 1945, was paid on April 10, 1945, and that the four quarterly instalments of salary for the tax year 1945–46 were paid on the due dates, on Sir Lynn's interpretation it would appear that three-quarters of the total salary would be assessed in one year of assessment and five quarters of the total salary in another year of assessment, which would seem to be an impossible conclusion. Moreover, having regard to rule 5, there would in some cases, on Sir Lynn's first interpretation, be double assessments. But I need pause no further on this, because, in my judgment, it is concluded by authority.

---

[4] (1931) 16 T.C. 605; 145 L.T. 225.

[5] [1928] I.R. 195.

[6] (1922) 12 T.C. 427.

[7] [1902] 2 K.B. 631; 18 T.L.R. 728; 4 T.C. 489.

There is, first of all, the Irish case of *M'Keown* v. *Roe*.[1] In that case: "The respondent was employed as solicitor to a "harbour board . . . and he was to be paid such costs in respect "of work done as were taxed and certified by the Taxing Master "of the High Court. For work done during the period of his "appointment (i.e., from December 2, 1924, to May 29, 1925), "he furnished two bills of costs which were not taxed until after "April 5, 1925. The total amount of his fees or profits for the "period of his appointment was £617, of which £422 was, on the "basis of work done, allocated to the year of assessment 1924–"25, the balance being allocated to the following year. From "December 2, 1924, (the date of his appointment), until April 5, "1925, he did not receive any payment in respect of his bills of "costs except a sum to cover certain disbursements made by him "on behalf of the harbour board.

"*Held*, that he was chargeable to income tax for the year of "assessment 1924–25, under Schedule E of the Income Tax Act, "1918, in respect of the sum of £422, notwithstanding that the "bills of costs which included this sum were not taxed or paid "within the year of assessment."

The President, towards the end of his judgment, said this[2]: "The argument on behalf of Mr. Roe is that, as the £422 was not "received by him during the year 1924–25, it cannot be taken "into account in the assessment for that year. I do not take "that view. The effect of rule 5 is that where a person subsequent to the year of assessment becomes entitled to additions "to his salary for that year, these additions are to be taken into "account as part of the salary for the year of assessment, 'so that "'he may be charged in respect of the full amount of his salary, "'fees, or emoluments for that year.' This seems to me to afford "a clear indication that in taxing the profits of an office under "Schedule E, such profits are not confined to the amount actually "received in the year of assessment, but include fees or emoluments which were earned by the holder of the office during "that year, and subsequently paid."

---

[1] [1928] I.R. 195.

[2] Ibid. 201.

O'Byrne J. said [3]: " All the rules point to the conclusion that, " where a person holds an office, the amount which he earns " during any particular year of assessment is the amount on " which he is liable to be assessed for the tax for that year."

In *Dracup* v. *Radcliffe* [4]: " The appellant was appointed " director of a company on May 18, 1942, and an assessment was " raised for the year 1942–43 on remuneration voted to her on " July 28, 1942, in respect of her services from date of appointment to the end of the company's year on June 30, 1942, and " on the proportion to April 5, 1943, of the remuneration for the " year to June 30, 1943, voted to her on July 27, 1943. The " appellant contended that the assessment should be based on " the remuneration voted on July 28, 1942, and no more. *Held*, " that the assessment was correct." Macnaghten J. said [5]: " The " point made on behalf of the appellant is that when the tax year " 1942–43 terminated at midnight on April 5, 1943, she was not " entitled to any remuneration for her services during the preceding nine months. It is true there was a hope that the company in " general meeting, in exercise of the powers conferred upon it by " article 69 of the articles of association, would be pleased to " vote some remuneration for the directors, but they had not done " so, and they did not do so until July 27. It is true that they " then voted £1,500 free of tax, as they had done the previous " year, and it is true that the directors decided that they would " each of them take one-quarter of that sum; but she was not " entitled, when April 5, 1943, ended, to anything, and therefore, " it is said that, although in fact she has been paid for her " services as a director during those nine months, she cannot be " assessed to income tax in respect thereof for the tax year " 1942–43." Then, after referring to the rule, Macnaghten J. said [6]: " It seems to me that the case is a very plain one. It is " made plainer by rule 5 . . . It is obvious that where, after the " end of a tax year, the salary of the holder of an office is " increased as from an antecedent date, say from January 1, the " person to whom the additional salary is given would be liable " to have an additional assessment. The case decided in the " Irish courts, *M'Keown* v. *Roe*,[7] is clear authority in favour " of the view that has been put forward on behalf of the Crown, " although that, of course, is not a decision binding upon me."

Sir Lynn next submitted that the words " for the year of

---

[3] [1928] I.R. 195, 203.

[4] (1946) 27 T.C. 188.

[5] Ibid. 190.

[6] Ibid. 191.

[7] [1928] I.R. 195.

1954

HEASMAN
v.
JORDAN.

Roxburgh J.

"assessment" were to bear alternative constructions, varying according to circumstances, but this seems to me to be an impossible burden to throw on the single word "for" which, in my judgment, is not really ambiguous. It was next contended that there was a presumption that a payment for services rendered was for services rendered in the year in which the payment was made; but I can find no statutory presumption of any sort. It seems to me that it is a pure question of fact.

What, therefore, are the facts here? The bonus was not calculated with reference to output in the year of assessment, nor were all members of the staff in one salary group paid equal amounts. The bonus was correlated with the length of service of the particular member of the staff during the war years, and it was limited to the monthly-staff to the exclusion of the weekly-staff. Where a particular member of the staff had been transferred during the war period from weekly payment to monthly payment of remuneration, only his monthly service was taken into consideration. The bonus was given in pursuance of a promise which had been reiterated in many directions over many years. The very terms of the letter which accompanied the payment clearly show that the bonus was not intended to be a reward for services rendered in that particular year of assessment only.

The commissioners, having found the facts, concluded from them that the bonus of £1,250 paid to the appellant in July, 1945, was an emolument of the year in which the appellant received it. I understand this to be a conclusion that it was a reward in respect of services rendered in that year only. I cannot agree with that conclusion. I feel driven to the conclusion that it was a reward for services rendered between May 21, 1941, and either June 27, 1945, or the date in July when it was paid, and cannot be treated as paid wholly for the year in which it was assessed. The appeal must therefore be allowed.

Appeal allowed. Case remitted to the commissioners for adjustment of the assessment in accordance with the judgment of the court.

Solicitors: *Simmons & Simmons; Solicitor of Inland Revenue.*

I. G. R. M.

END OF VOLUME AND OF CHANCERY SERIES FOR 1954.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1954, will be as follows:—

In the First Series,
[1954] Ch. [1954] P.

In the Second Series,
[1954] 1 Q.B. [1954] 2 Q.B.

In the Third Series,
[1954] A.C.

INDEX

ADOPTION—*Succession—Conflict of laws—Intestacy—Adopters domiciled in England—Child born and adopted in Canada—Death of adopter intestate—Entitlement of child on intestacy—Adoption Act*, 1950 (14 *Geo.* 6, *c.* 26), *s.* 13 (1) (4).

Conflict of Laws.
In re Wilson, decd. - - **Vaisey J. 733**

AGRICULTURE — *Agricultural holding — Notice to quit — Validity — Reference to part only of land—Joint tenancy—Tenant dying within three months — " Tenant " including tenants—Interpretation Act*, 1889 (52 *&* 53 *Vict. c.* 63), *s.* 1—*Agricultural Holdings Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *s.* 24 (1) (2) (*g*).

*Landlord and Tenant—Statute—Construction—Singular including plural—Joint owner*hip.
Woodward *v.* Earl of Dudley
Danckwerts J. 283

APPEAL—Death of party. See Trade Union.

BONA VACANTIA—Crown. See Will.

CHARITY—*Bequest of a residence for the High Commissioner of Australia—Provision* or *renunciation of primary trust at any future* ate*—Alternative trust " for such other uses " preferably . . . in connexion with Australia " as the . . . National Trust and my sister " . . . may jointly decide . . ."—Perpetuity* ule*—No general charitable intent.*

Perpetuity rule. " Renunciation at any " future date." Will.
In re Spensley's Will Trusts. Barclays Bank Ld. *v.* Staughton - - **C.A. 233**

2. —— Foreign objects. See Revenue.

3. —— *Relief of poverty—Working classes —Gift " to provide dwellings for the working classes in the area of P."*

CHARITY—*continued.*

Charity—Cy-près doctrine—" General charitable intention " — Express — Ineffective. " Working class."
In re Sanders' Will Trusts. Public Trustee *v.* McLaren - - **Harman J. 265**

4. —— *Will — Bequest for " commercial " education " — Advancement of education — Primary trust of public nature—Direction to prefer members of limited class—Validity.*
In re Koettgen's Will Trusts. Westminster Bank Ld. *v.* Family Welfare Association Trustees Ld. - - **Upjohn J. 252**

5. ——. See Estoppel.

CHILD—Construction. See Will.

CHILDREN AND YOUNG PERSONS—*Foster-children—Meaning—Residential school —Fees paid by parents or local authorities—Parental control not relinquished—Not " living apart " from parents—Not " foster-children "—" Nursing and maintenance "—" Nursing " not confined to sick nursing—Public Health Act*, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 49), *s.* 206 (1) (3).
Wallbridge *v.* Dorset County Council
Lloyd-Jacob J. 659

COAL—Nationalization. See Company.

COMPANY—*Reduction of capital—Colliery company—Assets of company taken over by National Coal Board—Preference capital reduced on footing that right to claim adjustment of compensation unaffected—Resolution for repayment of preference stock in full—Validity—Whether reduction just and equitable—Terms of earlier company's circular—Companies Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *ss.* 66, 67—*Coal Industry Nationalization Act*, 1946 (9 *&* 10 *Geo.* 6, *c.* 59), *s.* 25.

Company—Shares—Preference. Coal nationalization—Compensation.
In re Old Silkstone Collieries Ld.
C.A. 169

COMPANY—*continued.*

2. —— *Shares — Valuation — Shares in private company—Controlling interest—Valuation under article—Purchase by surviving directors—Break-up value of assets—Value as going concern — No expectation of profit-making.*

Accountant or auditor—Certificate.
DEAN *v.* PRINCE - - - - **C.A. 409**

3. —— *Voluntary winding up — Suspected fraud by director—Application by liquidator for public examination of director—Jurisdiction to direct such examination in voluntary winding up—Companies Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *ss.* 270 (1), 307 (1).
In re CAMPBELL COVERINGS (No. 2)
Wynn-Parry J. 225

4. —— *Winding up — English company trading in India — Whether Indian tax provable in liquidation of company—" Liabilities "—Unenforceable liability.*

Conflict of Laws—Revenue laws—Whether enforceable in other State — Commonwealth countries—Administration of estates—Winding up of company—Rules applicable—Lex fori—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 302.
In re DELHI ELECTRIC SUPPLY AND TRACTION CO. LD. - - - - - - **C.A. 131**

5. —— *Winding up — Lease of valuable property to company at less than rack-rent—Assignment of lease for value in voluntary liquidation of parent company—Claim by lessor to have sufficient assets set aside to meet future liability under covenants—Right to prove in liquidation—Landlord and tenant — Lease — Assignment — Landlord's rights against original tenant and assignee—Judicial precedent—House of Lords decision—How far binding—Irreconcilable cases of higher tribunals.*
In re HOUSE PROPERTY AND INVESTMENT CO. LD. - - - - **Roxburgh J. 576**

6. —— *Winding up — Foreign corporation—Foreign company dissolved in Russia—Unregistered company—No place of business in England—Outstanding assets in England—Petition to wind up—Opposition by Crown—Claim to assets as bona vacantia—Jurisdiction to wind up—Companies Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *ss.* 319, 353, 354, 399 (5) (*a*), 400.

Crown—Prerogative—Whether cut down by statute—Bona vacantia—Companies Act, 1948.
In re AZOFF-DON COMMERCIAL BANK
Wynn-Parry J. 315

CONFLICT OF LAWS—Revenue laws. See COMPANY.

CONFLICT OF LAWS—*continued.*

2. —— Settlement. See REVENUE.

3. ——. See ADOPTION.

COSTS—*Solicitor and client—Hostile litigation between trustees and beneficiaries — Whether trustees entitled to costs on basis of an indemnity.*
In re DARGIE, DECD. MILLER *v.* THORNTON-JONES - - - - - **Vaisey J. 16**

CROWN—Bona vacantia. See WILL.

2. —— Prerogative. See COMPANY.

CY-PRES. See CHARITY.

ESTOPPEL—*Per rem judicatam—Order for inquiry—No final determination of rights—Principle of res judicata by implication not applicable.*

Charity—Practicability—Bequest—Intervening tenancy for life—Date for determining practicability of bequest.
In re WRIGHT. BLIZARD *v.* LOCKHART
Roxburgh J. and C.A. 347

EVIDENCE—Foreign law—Construction of document. See REVENUE.

FOREIGN LAW—Construction of Document —Evidence. See REVENUE.

HIGHWAY—Legal estate. See TITHE.

HOSPITAL. See NATIONAL HEALTH SERVICE.

HUSBAND AND WIFE — *Property — Matrimonial home—Desertion by husband—Mortgage—Equitable mortgage of matrimonial home by husband—Power of attorney to mortgagee to execute legal mortgage—Desertion by husband—Wife remaining in matrimonial home—Execution of legal mortgage pursuant to power of attorney—Effect—Whether mortgagee's right to possession subject to right of wife to remain in matrimonial home—Order under Married Women's Property Act*, 1882, *s.* 17—*Husband not to interfere with wife's possession—Validity of exercise of power of attorney.*

Mortgage—Matrimonial home—Enforcement —Order for possession—When order should take effect. Power of Attorney—Irrevocable.
BARCLAYS BANK LD. *v.* BIRD
Harman J. 274

INFANT—Custody. See JUSTICES.

JUSTICES — *Infant — Custody — Order for access—Variation of order by different court—Jurisdiction—Custody order including order for maintenance—Whether " order for the payment of money "—Guardianship of Infants*

JUSTICES—*continued.*
Act, 1886 (49 *&* 50 *Vict. c.* 27), *s.* 5—*Criminal Justice Administration Act*, 1914 (4 *&* 5 *Geo.* 5, *c.* 58), *s.* 30 (3)—*Guardianship of Infants Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 45), *s.* 3 (4)—*Emergency Laws (Miscellaneous Provisions) Act*, 1947 (11 *&* 12 *Geo.* 6, *c.* 10), *Sch.* 2, *para.* 6—*Children Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 43), *s.* 53—*Guardianship and Maintenance of Infants Act*, 1951 (14 *&* 15 *Geo.* 6, *c.* 56), *s.* 1—*Magistrates' Courts Act*, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55), *s.* 132, *Sch.* 6.
In re Dankbars (an Infant) - **C.A. 98**

LANDLORD AND TENANT — Lease — Assignment. See Company—Winding up.

2. —— *Underlease — Provision against underletting without consent — Consent not to be unreasonably withheld—Proposed underletting at low rent and in consideration for substantial premium — Consent withheld — Whether unreasonable—Effect of underletting —Lessor's right of re-entry—Relief for underlessee—Bankruptcy of underlessor—Distress—Lessor's right against underlessee.*
In re Town Investments Ld. Underlease. McLaughlin *v.* Town Investments Ld.
Danckwerts J. 301

3. ——. See Agriculture.

4. ——. See Mortgage.

MATRIMONIAL HOME. See Husband and Wife.

MORTGAGE—*Landlord and tenant—Letting by contracting purchasers — Subsequent completion of purchase—Legal charge to raise purchase-money — Whether completion and charge one transaction—Tenancy by estoppel as against mortgagees—Rent restriction.*

Landlord and Tenant—Mortgage.
Church of England Building Society *v.* Piskor - - - - - - **C.A. 553**

2. —— Of matrimonial home. See Husband and Wife.

NATIONAL HEALTH SERVICE—*Hospital —Meaning—Home for incurables—No curative treatment provided—Whether home transferred to Ministry of Health—National Health Service Act*, 1946 (9 *&* 10 *Geo.* 6, *c.* 81), *ss.* 6 (1), 79.

"*Hospital.*" "*Treatment.*"
Minister of Health *v.* General Committee of the Royal Midland Counties Home for Incurables at Leamington Spa. - **C.A. 530**

NUISANCE See Public Health.

PASSING OFF—Trade Mark. See Trading with the Enemy.

PERPETUITIES. See Charity.

2. ——. See Power of Appointment.

POWER OF APPOINTMENT—*Construction —" Wife "—Power of appointment before marriage or by will—To " wife " if she should survive appointor—Appointment by irrevocable deed in contemplation of marriage—Subsequent divorce on wife's petition—Whether appointee qualified on death of appointor.*
In re Allan. Allan *v.* Midland Bank Executor and Trustee Co. - - **C.A. 295**

3. —— *Fraud on power—Revocation of appointment — Release — Scheme reducing estate duty—Benefit to appointor and potential appointees—Whether fraud on power—Whether doctrine applies to revocation of appointment.*

Revenue—Tax avoidance scheme.
In re Greaves. Public Trustee *v.* Ash
Vaisey J. and C.A. 434

3. —— *General or special power — Joint power—Whether equivalent to joint property —Joint power to be exercised with consent of third party—Rule against perpetuities.*

Rule against Perpetuities.
In re Churston Settled Estates
Roxburgh J. 334

PRACTICE AND PROCEDURE—Death of Party. See Trade Union.

PRIVATE INTERNATIONAL LAW—Settlement. See Revenue.

PUBLIC HEALTH — *Sewage — Overflow — Whether local authority liable—Overflow from overcharged sewer—Statutory duty of local authority to permit connexions to sewer—Nuisance — Rylands* v. *Fletcher — Public Health Act*, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 49), *s.* 31.

Rylands v. *Fletcher — Local authority — Applicability of rule to local authority performing statutory duties. Nuisance.*
Smeaton *v.* Ilford Corporation
Upjohn J. 450

RES JUDICATA. See Estoppel.

REVENUE—*Estate duty—Surrender of life interest — Personalty — Investments subsequently made—" Property " deemed to pass on death—Finance Act*, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 22 (1) (*f*)—*Finance Act*, 1940 (3 *&* 4 *Geo.* 6, *c.* 29), *s.* 43.

Conflict of Laws—Settlement—Proper law—Executed in England—Parties domiciled in Ireland—English solicitors—Same system of law in both countries—No express power to

REVENUE—*continued.*

invest in land in Ireland. Trust and Trustee. Trust fund—Conception as continuing entity —" Property taken."
IVEAGH *v.* INLAND REVENUE COMMISSIONERS **Upjohn J. 365**

2. —— *Estate duty — Surrender of life interest—Duty on released property—Trustee's accountability—Property remaining in settlement accountable for duty — Lien — " Property " deemed to pass on death—£25,000 released—Investments handed over—Finance Act*, 1940 (3 *&* 4 *Geo.* 6, *c.* 29), *s.* 43 (1)—*Finance Act*, 1950 (14 *Geo.* 6, *c.* 15), *s.* 44 (1), (3), (4).
In re JOYNSON'S WILL TRUSTS. GADDUM *v.* INLAND REVENUE COMMISSIONERS **Danckwerts J. 567**

3. —— *Income tax — Charity — Foreign body—Corporation incorporated in U.S.A. for charitable purposes—Whether entitled to exemption from income tax—" Any body of " persons or trust established for charitable " purposes only "—Meaning—Income Tax Act*, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 37 (1).
Charity—Public—Foreign objects. Evidence —Foreign law—Construction of document—Admissibility of evidence of foreign lawyer.
Statute — Construction — Subsequent enactments — Whether relevant in interpreting earlier Act. " Any body of persons."
CAMILLE AND HENRY DREYFUS FOUNDATION INC. *v.* INLAND REVENUE COMMISSIONERS **C.A. 572**

4. —— *Income tax — Special bonus — Attributable to work for several years—Not assessable as income of year of payment—Income Tax Act*, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. E, rr.* 1, 5.
HEASMAN *v.* JORDAN - **Roxburgh J. 744**

5. —— *Income tax—Two trades—Stud farm —Trade under Schedule D—Racing stables—Recreational and not taxable—Transfer of horses from farm to stables—Value attributable to transferred horses in stud farm accounts.*
SHARKEY *v.* WERNHER - - - **C.A. 713**

6. —— *Profits tax — Company — Preference shares redeemed at a premium—Premium not a " distribution " for purposes of profits tax—Sum applied in reducing share capital—Finance Act*, 1947 (10 *&* 11 *Geo.* 6, *c.* 35), *s.* 36 (1), *proviso.*
" Applied." Company.
INLAND REVENUE COMMISSIONERS *v.* UNIVERSAL GRINDING WHEEL CO. LD. - **C.A. 117**

7. —— *Surtax — Company — Company in liquidation—Broken period from accounting period to liquidation—Undistributed profits deemed available for distribution—Reasonableness of withholding income from distribution—Finance Act*, 1922 (12 *&* 13 *Geo.* 5, *c.* 17), *s.* 21 (1)—*Finance Act*, 1927 (17 *&* 18 *Geo.* 5, *c.* 10), *s.* 31 (1) (4).
Judicial Precedent—Court of Appeal decision — Per incuriam — Ruling unnecessary to decision—Authority not cited—Later House of Lords' decision—Point not fully argued—Ratio decidendi.
A. & J. MUCKLOW (IN LIQUIDATION) *v.* INLAND REVENUE COMMISSIONERS - **C.A. 615**

8. —— Tax avoidance. See POWER OF APPOINTMENT.

RYLANDS v. FLETCHER—Rule in. See PUBLIC HEALTH.

SETTLED LAND—*Improvements—Payment out of capital moneys—Settled Land Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 18), *ss.* 73 (1) (*iv*), 84, 87 —*Agricultural Holdings Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *s.* 81 (1), *Sch. III, para.* 23.
In re LORD BROUGHAM AND VAUX'S SETTLED ESTATES - - - - - **Vaisey J. 24**

2. —— *Trustees — Appointment of new trustees — Retirement of existing trustees — Will — Devise — Property becoming settled land on January* 1, 1926 — *Personal representatives by representation — Trustees for the purposes of the Settled Land Act—Whether power to retire and appoint new trustees—Settled Land Act*, 1925 (15 *Geo.* 5, *c.* 18), *s.* 30 (3)—*Trustee Act*, 1925 (15 *Geo.* 5, *c.* 19), *ss.* 64, 68 (5).
Trust and Trustee.
In re DARK, DECD. GLOVER *v.* DARK **Roxburgh J. 291**

SETTLEMENT — " Proper law." See REVENUE.

2. —— *Voluntary settlement—Covenant to settle after-acquired property—Receipt of property by trustees—Application by covenantor to avoid covenant—Relief in equity sought.*
In re ADLARD. TAYLOR *v.* ADLARD **Vaisey J. 29**

SLANDER OF TITLE—Trade Mark. See TRADING WITH THE ENEMY.

STARE DECISIS—Irreconcilable cases in higher tribunals. See COMPANY—Winding up.

2. ——. See REVENUE.

STATUTE—Construction—Joint Ownership. See AGRICULTURE.

TITHE—*Tithe redemption annuity—Chargeability—" Estate owner "—Highway authority*

TITHE—*continued.*

—Liability to contribute—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *ss.* 7 (1), 205 (1) (v) (ix)—*Local Government Act*, 1929 (19 *&* 20 *Geo.* 5, *c.* 17), *s.* 29—*Tithe Act*, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 43), *ss.* 10, 17 (1) (3).

Legal Estate—Highway—Statutory vesting in local authority—Determinable fee simple—"Any similar statute"—Law of Property Act, 1925, *s.* 7 (1).

Tithe Redemption Commission *v.* Runcorn Urban District Council **Dankwerts J. and C.A. 383**

TRADE MARK — *Registration — Name of plant—Roses—Trade marks the "variety" names—Variety names sole designation of a rose — Not distinctive — Confusion — Wrongly registered — Rectification of register — Trade Marks Act*, 1938 (1 *&* 2 *Geo.* 6, *c.* 22), *ss.* 9, 11 (1), 15, 32 (1).

"*Distinctive Mark.*"

In re Wheatcroft Bros. Ld.'s Trade Marks - - - - **Lloyd-Jacob J. 201**

2. ——. See Trading with the Enemy.

TRADE UNION—*Whether legal entity—Action against union by member—Expulsion of member—Rules of union—Construction—Right of expulsion by committee of union—Expulsion by secretary ultra vires—Claim for damages—Nature of contract between trade union and members—Whether trade union a legal entity vis-à-vis members—Whether trade union officials agents of members—Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *s.* 82 (1).

Practice and Procedure—Death of party—Effect—Death of appellant after hearing and before judgment given. Court of Appeal—Abatement of appeal. Damages.

Bonsor *v.* Musicians' Union - **C.A. 479**

TRADING WITH THE ENEMY—*Custodian of Enemy Property—Power of sale—Sale of trade mark and goodwill—Whether intra vires—Trading with the Enemy Act*, 1939 (2 *&* 3 *Geo.* 6, *c.* 89), *ss.* 7, 16—*Trading with the Enemy (Custodian) Order*, 1939 (*S.R. & O.* 1939, *No.* 1198) — *Distribution of German Enemy Property Act*, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 85)—*Distribution of German Enemy Property (No.* 1) *Order*, 1950 (*S.I.* 1950, *No.* 1642), *para.* 18 (1) (3).

Trade Mark—Assignment—Goodwill—Mark enemy owned—Assigned with goodwill in this country—Whether any common law rights left in enemy—Use of mark on envelopes sent from Germany — Infringement — Slander of title—Passing off — Injunction – Challenge in good faith—Practice—Trade Marks Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 22), *ss.* 2, 7, 8, 22.

R. J. Reuter Co. Ld. *v.* Mulhens **C.A. 50**

TRUST AND TRUSTEE—*Protective trust—Express—Advancement—No express advancement clause — Whether statutory power of advancement—Whether forfeiture incurred by consent to exercise such power—Trustee Act*, 1925 (15 *Geo.* 5, *c.* 19), *ss.* 32, 33, 69.

In re Rees, decd. Lloyds Bank Ld. *v.* Rees - - - - - **Upjohn J. 202**

2. ——. See Revenue—Settled Land—Will.

WILL—*Condition subsequent—Devise subject to condition—Restraint on alienation—Alienation confined to brothers — Whether valid — Applicability of principle to realty and personalty.*

In re Brown, decd. District Bank Ld. *v.* Brown - - - - **Harman J. 39**

2. —— *Construction—"Child"—Adoption—Whether adopted child to benefit—Adopter unable to bear children—Intention—"Disposition"—Whether "disposition" made at date of will or at date of death of testator—Adoption of Children Act*, 1926 (16 *&* 17 *Geo.* 5, *c.* 29), *s.* 5 (2) (4)—*Adoption Act*, 1950 (14 *Geo.* 6, *c.* 26), *ss.* 13, 14, *Sch. V*, *s.* 4.

In re Gilpin. Hutchinson *v.* Gilpin **Upjohn J. 1**

3. —— *Construction—Date of ascertainment of qualification—Devise to eldest son "who "shall be a member of the Church of England "and an adherent to the doctrine of that "Church"—Previous life interests.*

In re Allen, decd. Faith *v.* Allen (No. 2) - - - - - **Harman J. 259**

4. —— *Construction—Intestacy, as on—Residue to pass to persons entitled as on intestacy of testator's widow—Widow illegitimate—Right of Crown—Bona vacantia—Nature of Crown's entitlement to estates of persons dying intestate—Administration of Estates Act*, 1925 (15 *Geo.* 5, *c.* 23), *s.* 46 (1).

Crown—Bona vacantia.

In re Mitchell, decd. Hatton *v.* Jones **Wynn-Parry J. 525**

5. —— *Specific devise—Voidable interest—Devise of property comprised in estate of which testatrix trustee and purchased by her through nominee—Property recoverable by beneficiaries on paying amount of price paid by testatrix—Whether payable to specific devisee or to estate of testatrix.*

Trust and Trustee—Breach of trust—Trust property purchased by trustee.

In re Sherman, decd. *In re* Walters, decd. Trevenen *v.* Pearce - **Harman J. 653**

6. ——. See Charity.

BIBL. LONDIN. UNIV.

UL 16 JUN 1955